TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 124.

JOHN WILLIAMS, CHIEF, ETC., [illegible]
PARK ET AL., APPELLANTS,

vs.

CITY OF ORLEANS, [illegible]
PARK ET AL.

APPEAL FROM THE [illegible]
[illegible]

FILED [illegible]

(24,731)

(24,731)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 128.

JOHN WILLIAMS, CHIEF; MICHAEL WILLIAMS, SECRETARY, ET AL., APPELLANTS,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1–7 *Amended Bill.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissionrs, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

Amended Bill of Complaint.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of Illinois, Eastern Division:

John Williams, Chief, Michael Williams, Secretary, Thomas Topash, Chairman Business Committee, Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, residing in the State of Michigan, by leave of court hereby present their bill of complaint against the
City of Chicago, a municipal corporation within the County
8 of Cook and State of Illinois; the Illinois Central Railroad Company, a corporation organized under the laws of the State of Illinois, the South Park Commissioners, a municipal corporation within the County of Cook aforesaid; the Lincoln Park Commissioners, a municipal corporation within the County of Cook aforesaid; Illinois Steel Company, a corporation organized under the laws of the State of Illinois, the Michigan Central Railroad Company, a corporation organized under the laws of the State of Michigan, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation organized under the laws of the State of Ohio, and the Minneapolis, St. Paul and Sault Ste. Marie Company, a corporation organized under the laws of the State of Minnesota.

These complainants represent:

1. They bring this action on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other

members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them; that the matter in controversy in this cause, exclusive of interest and costs, exceeds the sum of value of Three Thousand Dollars ($3,000), and arises under the Constitution and laws of the United States and treaties made under their authority; that it is to redress the deprivation under color of laws, statutes, regulations and ordinances of the State of Illinois, of rights, privileges and immunities secured to these complainants and the said Pottawatomie Nation of Indians by the Constitution of the United States prohibiting the passing of any law impairing the obligations of contracts, and without due process of law, as provided by the 14th amendment of the Constitution of the United States.

2. That these complainants and the members of the said Pokagon Band of Indians and all others, if any, on whose behalf this suit is brought, are members of the Pottawatomie Nation of Indians with whom the United States, on the 3rd day of August, 1795, entered into a treaty of peace at Greenville, Ohio, to which these complainants refer and ask that the same may be considered a part of this bill of complainant.

3. That at the time of the making of said treaty the said Pottawatomie Nation of Indians were the owners of and in possession and in occupancy as a sovereign and independent nation, from time immemorial preceding the said treaty, as their country, of large tracts of land around and along all the shores of Lake Michigan south of a line running between the north of the Milwaukee river in the now State of Wisconsin, and the mouth of the Grand River in the now State of Michigan extending said line East and West of said two points and including all of Lake Michigan which is South of said line.

4. That in and by said treaty of Greenville, the United States relinquished their claims to all Indian lands, other than those enumerated in and by said treaty as ceded to the United States,—as lay northward of the River Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain in the treaty of peace made between them in the year 1783, which said relinquishment included the said lands and the country of the said Pottawatomie Nation, except the portions in and by said treaty excepted, which were thereby ceded to the United States.

5. That this proceeding is brought for the restoration to the complainants of lands so relinquished by the United States and not included in any cession to the United States, either in or by the said treaty of Greenville aforesaid, or in any treaty or cession since then made.

6. That in and by Article V of said treaty it is provided as follows:

"Article V."

"To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of the relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes *against* acknowledge themselves to be under the protection of the said United States and no other power whatever."

7. That in and by Article VI of said treaty of Greenville it is provided as follows:

11 "Article VI."

"If any citizen of the United States or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; the Indian tribe, on whose land the settlement shall be made, may drive off the Settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein stipulated."

8. That in and by Article IX of said Greenville treaty it is provided:

"the United States shall give notice to the said Indian tribes of any harm that may be meditated against them; or either of them, that shall come to their knowledge; and do all in their power to hinder and prevent the same, that the friendship between them may be uninterrupted."

9. It is provided in and by Article III of said treaty of Greenville that:

"whenever the United States shall think proper to survey and mark the boundaries of the lands hereby ceded to them, they shall give timely notice thereof to said tribes of Indians, that they may appoint some of their wise chiefs to attend and see that the lines are run according to the terms of this treaty."

10. That among the cession of land by the Indian Nations parties to said treaty of Greenville, to the United States, was a — described in Article III of said treaty:

"One piece of land six miles square at the mouth of Chicago

river emptying into the southwest end of Lake Michigan where a fort formerly stood;"

but these complainants say that no survey was ever made to mark the boundary of the cession lands described, as provided in and by said treaty.

12 11. That on the 24th day of August, 1816, another treaty was entered into between commissioners plenipotentiary of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the Southwest parts of Lake Michigan, on the other part, in and by which said treaty the said Chiefs and Warriors for themselves and the tribes they represented, ceded to the United States certain land therein described, the eastern boundary of which is described therein as a line running from a point on Lake Michigan ten miles Northward of the mouth of the Chicago creek, thence along the Lake to a point ten miles southward of the mouth of the said Chicago creek, and in and by which said last named treaty the parties thereto pledged themselves and each other to fulfill with perfect good faith, all the obligations imposed upon them by former treaties.

12. That the term "the United tribes of Ottawas, Chippewa, and Pottawatomies" used in said last named treaty was and is synonymous with the term "Pottawatomie Nation," or "Pottawatomie Tribe," for such united tribes consisted, and do consist, merely of certain members of Ottawas and Chippewas who had been adopted or naturalized with the original Pottawatomie Nation, and did not and does not include any members of the Ottawa or Chippewa tribes which have remained independent of and have not coalesced or became adopted or naturalized with the said Pottamatomie Nation.

13 13. That subsequently, the government of the United States caused a survey to be made of the lands ceded in and by the treaty last named, in and about the year 1819 by one John C. Sullivan, surveyer, which said survey purported to fix the so-called Indian boundary lines, the East boundary of which marked the Eastern limit of the cession so made under and by virtue of the said two treaties hereinabove named, copy of which survey is attached to the original bill of complaint marked Exhibit "B" and made a part hereof.

14. That thereafter, at various times, various cessions were made by said Pottawatomie Nation to the United States by treaty between the United States and said Pottawatomie Indians, purporting to be bounded on the East by the then shores of Lake Michigan to and beyond the boundary line between the States of Wisconsin and Illinois on the North, and to and beyond the boundary line between the States of Illinois and Indiana on the South and Southeast; but that none of such cessions purported to run further east, northeast or North than the then West, Southwest or South shores of Lake Michigan.

15. That neither the said Pottawatomie Nation nor the said

Pokagon Band have at any time ceded to the United States any reclaimed lands or formerly submerged or now submerged lands of Lake Michigan within the geographical limits of the State of Illinois East, Northeast, or North of the lines as fixed in the several surveys made in pursuance of any cessions by said Pottawatomie Nation; and all such lands, whether reclaimed, artificially made, or now or formerly submerged, East, Northeast and North of said lines have remained and still are the property of these com-
14 plainants, and nothing has occurred since the making of the aforenamed treaties which has in any way impaired their right or title in and to the same, and any attempts on the part of any persons, firms, and corporations to appropriate the same, or any part thereof were and are in violation of said treaties and of the rights of these complainants in and to said lands, and entitle these complainants to invoke the power and authority of the United States to hinder and prevent the same, and to break them up and remove and punish the settlers as they, the United States, may think proper and so effect that protection of the Indian lands stipulated in and by said treaty of Greenville.

16. That many firms, persons and corporations, including the defendants herein named, consisting of citizens of the United States and other white persons, have, without the consent of these complainants, or of the Pottawatomie Nations, from time to time seized large tracts of lands, both reclaimed, artificially made and others, East, Northeast, and North and altogether outside of any of said cessions to the United States, and so these complainants say that they are entitled to invoke the protection of the United States in the quiet enjoyment of all such lands against all said defendants and other white persons who have intruded, or threaten to or will intrude upon the same without their consent. That said seizures have been and are in violation of the said treaties; but very few improvements of great value have been made thereon and most of them within recent years; nearly all such improvements of any substantial value have been made since these complainants have openly, notoriously and publicly asserted their claims or right of
15 property and with full and explicit knowledge or notice of such rights in these complainants; and that these complainants have done or suffered nothing as to any part of such lands which justly or properly gives the right to any claim to any of these defendants of title to these lands or any part thereof under any statute of limitations, laches, or estoppal and these complainants at no time expressly or implicitly abandoned said lands or any part thereof.

17. These complainants further represent that they are too weak at the present time to drive off the said defendants and other settlers or to punish them and that, furthermore, they, these complainants, have for many years lived in peace and amity with their white neighbors and have abandoned the arts of warfare as a tribe, nation or band, and have altogether relied upon the protection of the United States as guaranteed and promised them in and by said

treaty of Greenville and other treaties, and by the Constitution and laws of the United States.

18. These complainants further say that they have from time to time made offers to the United States to sell such lands, or parts thereof to the United States, but that hitherto the United States has refused or failed to purchase them, and so these complainants say that they are at liberty to occupy, sell, lease or otherwise dispose of them as their own lands in fee simple, without let or hindrance from the United States or anyone else, but that owing to the acts of the defendants and others above stated, by seizing some of said lands and occupying the same to the exclusion of these complainants, a cloud has been created upon the title of these complainants in and to said lands and their ability to sell or lease or otherwise dispose of the same, or any parts thereof, and receive adequate compensation thereof, has become greatly impaired.

16

19. These complainants further say, that the only sale or cession by them or in their behalf purported to have been made since the making of the above mentioned treaties was one to William H. Cox on the 5th day of April, 1897, by one Simon Pokagon purporting to act on behalf of said Pokagon Band, by a certain quitclaim deed, duly acknowledged and on the 8th day of April, 1897, filed for record in the Office of the Recorder of Deeds of Cook County, Illinois, and recorded as Document 2,520,164 in Book 5964 of Records, at page 472, the validity of which said deed the complainants, in this proceeding neither admit nor deny.

20. These complainants further represent that at the time of the admission of the State of Illinois as one of the United States, the said United States did not have any title in or to any of the lands, submerged or other, East, Northeast or North of the meandering lines hereinabove mentioned, and upon such admission the said State of Illinois acquired none and has at no time since then acquired any, and has been under the Constitution and laws of the United States and under the said treaties made by their authority, without power or authority to convey or dispose of said lands, or any of them, and no firm, person or corporation, municipal or other has ever *been* or has such power to so dispose of the same, or any part thereof, or to occupy or seize the same without the consent of these complainants by any purported authority from the State of Illinois.

17

21. These complainants further represent that on the 28th day of July, 1913, a certain ordinance was passed by the City Council of the City of Chicago, one of the defendants herein named, and approved by the Mayor of said City of Chicago on the 31st day of July, 1913, and published on the 6th day of August, 1913, copy of which said ordinance except exhibits (therein named) is attached to the original bill of complaint herein filed, marked Exhibit "A" and made a part hereof. That the passage of said ordinance was purported to be based upon an act of the State of Illinois represented in General Assembly, approved June 23, 1913, entitled an Act "to enlarge the power of cities and villages in relation to harbors, canals, slips, wharves, docks, levees, piers, quay walls, break-waters and all

harbor structures, facilities, connections, improvements and utilities constructed or operated in connection therewith and for the purpose of carrying out such power to authorize the acquisition and condemnation of property, and to authorize the use, occupation, recovery and acquisition of artificially made or reclaimed lands of the State and the reclamation and acquisition of the submerged lands of the State, and to repeal an Act entitled, 'An Act to enlarge the power of cities in relation to harbors, canals, wharves, docks, piers, slips and other harbor structures, facilities, improvements and utilities constructed or operated in connection therewith, to authorize the acquisition and condemnation of property and the use, occupation, reclamation and acquisition of the submerged lands of the State in carrying out such power, and to repeal all Acts or parts of Acts in conflict therewith,' approved June 10, 1911, and to repeal all other Acts or parts of Acts in conflict therewith"; that the said last named Act so far as it is claimed by the defendant, the City of Chicago to authorize the passage of said ordinance and of the acts done or threatened thereunder by the defendant, the City of Chicago its officers and agents and the Harbor & Subway Commission named in such ordinances, as herein set forth, is wholly null and void to the extent of the encroachments upon or building upon the reclaimed or submerged lands formerly or now covered by the waters of

18 Lake Michigan and such statute and ordinance are in contravention of the Constitution of the United States and of the State of Illinois as depriving or tending to deprive these complainants of their property without due process of law as provided by the Fourteenth Amendment of the Constitution of the United States as in impairment of the obligation of contracts contrary to the first clause of the Tenth Section of Article One of the Constitution of the United States and of their provisions of the Constitution of the United States and of the State of Illinois.

Your orators further represent that on the 10th day of February, 1851, the State of Illinois by its General Assembly passed an Act incorporating the defendant, Illinois Central Railroad Company; that in and by the said Act the defendant Illinois Central Railroad Company was authorized to survey, locate, construct and operate a railroad and it was further in and by said act provided that nothing in the Act should authorize the last named Company to make a location of its road in any City without the consent of its Common Council; that the City of Chicago by its Common Council adopted an ordinance on June 14, 1852 in and by which ordinance the said defendant, Illinois Central Railroad Company was authorized to fill in portions of Lake Michigan which were and are the property of your orators and without the consent of your orators and the defendant, the Illinois Central Railroad Company did seize and fill in portions of said Lake Michigan in pursuance to such purported authority by the Act of the State of Illinois and the ordinances of the City of Chicago last named and has ever since then held and occupied the same without the consent of these complainants or of the Pottawatomie nation;

19 Your orators further represent that the State of Illinois from time to time by its General Assembly enacted various

other statutes under which the several defendants hereto have claimed and still claim the right, power and authority to seize and occupy and to make encroachments and build upon diverse portions of the aforesaid lands *or* your orators, but to the extent that such statutes or any of them would give or purport to give or by the defendants pretended to give any such power, right or authority, the same and each of them is and are wholly void and of no force and effect and contrary to the Constitution of the United States and of the State of Illinois in the respects hereinabove named and in other respects and are in violation of the aforesaid treaties and of the laws of the United States, and that all such acts either done or threatened, should in equity and good conscience be restrained and enjoined by this Honorable Court; that among such acts and statutes are the following:

"An Act to grant the title of certain submerged lands of Lake Michigan to the Commissioners of Lincoln Park and enable them to exercise police power over the water adjacent thereto, approved June 4, 1889."

"An Act to enable Park Commissioners having control of any boulevard or driveway bordering upon any public waters, this State to extend the same, approved June 4, 1889."

"An Act for the enlargement of Lincoln Park and to defray the expenses thereof, approved June 17, 1893."

"An Act to enable park commissioners having control of any park bordering upon public waters of this state to enlarge the same from time to time and granting submerged lands for the purpose of such enlargements and to defray the cost thereof, approved June 15, 1895."

"An Act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water, approved June 24, 1895."

"An Act to convey and designating certain submerged lands known as the Lake Front for park purposes, approved April 24, 1899."

"An Act to enable park commisssioners having control of a park or parks bordering upon public waters in this state to enlarge and connect the same from time to time by the extensions of other lands and the body of such waters, and defining the use which may be made of such extensions and granting submerged lands for the purposes of such enlargements, approved May 14, 1903.

"An Act conveying certain lands to the South Park Commissioners for the purpose of establishing a public park or pleasure ground thereon, approved May 14, 1903."

"An Act conveying certain lands to the South Park Commissioners for the purpose of establishing public parks and pleasure ground thereon, approved May 14, 1903.

"An Act authorizing park commissioners to acquire and improve submerged and shore lands for park purposes providing for the payment therefor and granting unto such commissioners certain rights and powers to riparian owners certain rights and titles, approved May 2, 1907."

22. These complainants further say that the artificially made or reclaimed or submerged lands embraced or intended to be embraced

within the boundaries of Harbor District No. 1 in said ordinance described, is all of it east, Northeast, North and outside of all cessions of land by the said Pottawatomies made under any treaty with the United States, is and are all the lands and property of these complainants, excepting such portion thereof as was purported to have been conveyed to the said William H. Cox in and by the deed
21 hereinabove described, and no part of it is or was at the time of the purported passage of said ordinance the property or lands of the State of Illinois, and that by reason thereof said ordinance is wholly null and void, without authority of law, and in contravention *and* the rights of these complainants under the provision of the said treaty of Greenville and of other treaties and should be so declared by this Honorable Court, and would furthermore constitute a seizure or taking of the property of these complainants without due process of law, in violation of the 14th amendment of the Constitution of the United States and is in impairment of the obligation of contracts contrary to the first clause of the tenth clause of Article 1 of the Constitution of the United States.

23. These complainants further say that none of the lands above described, East, Northeast and North of the said several cessions to the United States, has ever been subjected or brought within the jurisdiction of the State of Illinois or within the jurisdiction of the corporate authorities of the City of Chicago, was ever included in the public domain of the United States, or ever made subject to taxation by the State of Illinois or any subdivision or municipality thereof.

24. These complainants further represent that until the year 1833 the Pokagon Band of Pottawatomie Indians were a component part of the larger body or nation of Pottawatomie Indians named in the said treaty of Greenville and in subsequent treaties with the Government of the United States; that in the last named year the said Pottawatomie Nation became divided and that portion thereof not belonging to the said Pokagon Band migrated to a new coun-
22 try or territory West of the Mississippi River under and in pursuance of a treaty with the government of the United States leaving the said Pokagon Band in possession, occupancy and control and in sovereignty of whatever territory then remained unceded by the said Pottawatomie nation to the United States of the original land or country of the said Pottawatomie nation, and title in and to and control and sovereignty — the same has remained in the said Pokagon Band to the present time except and unless as affected by the aforesaid deed to William H. Cox.

25. That the several defendants hereinafter named above from time to time under the purported authority of the State of Illinois and under color of laws and statutes thereof, but without any authority at all and without consent or authority on the part of the Pottawatomie Nation of Indians, or anyone claiming by through or under them, filled in large portions of said Lake Michigan and have settled or threaten to settle upon portions of the same, and have seized and occupied and still continue to occupy them or threaten to seize or

occupy portions of them, and the said defendants have severally announced their intentions to fill in and reclaim large additional portions of the submerged lands of Lake Michigan within the geographical boundaries of the said State of Illinois, without the consent or permission of these complainants, or of said Pottawatomie Nation.

26. These complainants further represent that many other firms, persons and corporations have seized lands, the property of these complainants, other than those hereinabove mentioned, and also threaten to make further seizures in violation of the treaty rights of these complainants, as aforesaid.

Forasmuch, therefore, as your orators are without remedy in the premises except in a court of equity, and to the end that the said City of Chicago, Illinois Central Railroad Company, South Park Commissioners, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, who are made defendants hereto, and each of them, may be required to make, full, true and perfect answer to this Bill of Complaint (but not under oath) their answer under oath being hereby expressly waived) and that said City of Chicago, said Illinois Central Railroad Company, said South Park Commissioners, said Lincoln Park Commissioners, said Illinois Steel Company, said Michigan Central Railroad Company, said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and said Minneapolis, St. Paul and Sault Ste. Marie Railway Company, and each of them and their several officers, agents, servants and attorneys may be restrained and enjoined from making any further seizures of any of the lands of the complainants, as aforesaid, east, Northeast, or North of the boundary line of said cessions, and more particularly of such boundary line as established by the survey of the said John C. Sullivan, during the pendency of this suit and until the rights of the complainants in the premises can be fully adjudged and established by this Honorable Court; that more particularly the City of Chicago be so restrained and enjoined from constructing, maintaining or operating over and upon any part of the submerged lands of Lake Michigan within the limits of Harbor District Number 1 as described in the Ordinance copy of which is attached to the Complainants' Bill of Complaint, a passenger pier or freight pier or any other harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters or other harbor structures, facilities, connections or improvements or in connection therewith elevators, walls or warehouses, until the further order of this Court; that upon a hearing the said defendants and each of them, and each of their officers, agents, attorneys and servants may be perpetually enjoined and restrained from seizing, occupying or building any structures upon any part of the lands of these complainants above described, whether reclaimed or submerged, and from filling in or reclaiming any such submerged lands lying East, Northeast or North of the boundary lines of

cessions, to the United States heretofore made, without the consent, permission or authority of these complainants, and to be compelled to wholly remove therefrom and from every part thereof, and that they, and each of them be perpetually enjoined and barred from setting up or asserting any claims, title or interest in or to such lands, or any part of them; that the said several statutes of the State of Illinois and the ordinances named in said Bill of Complaint passed by the City Council of the City of Chicago on the 28th day of July, 1913, purporting to direct and authorize the building of Harbor District Number 1, a copy of which
25 said Ordinance is attached to the Complainants' original Bill of Complaint, may be declared to be in contravention and in violation of the rights of these Complainants under and by virtue of the treaty of Greenville entered into on the 3rd day of August, 1795, between the United States and the Pottawatomie Nation of Indians and referred to in this Bill of Complaint to the extent that the same purports to or are claimed to give to any of the defendants any right or title to, or to authorize the erection of any structures upon the submerged lands of Lake Michigan or the reclaiming or filling in of any part of such Lake Michigan and that said laws, statutes and ordinance to such extent may be declared to be wholly null, void and of no legal force or effect and that said defendants, their several officers, agents, employes and attorneys be perpetually enjoined from carrying out the provisions thereof to such extent; that they, the said several defendants, and each of them, may be required to account and pay to these complainants a reasonable compensation for the use and occupancy of the said lands for the periods during which such several occupancies have heretofore been had; that the title of these complainants in and to such several lands may be quieted, established and confirmed in accordance with the provisions of said treaty, and that these complainants may have such other and further remedy in the premises as to this Honorable Court may seem meet and as equity may require.

These complainants further pray that they may have leave from time to time hereafter to name additional parties defendant who may have seized or occupied, or may threaten to occupy or seize any portion of the aforesaid land.

26 May it please your Honors to grant unto the complainants not only a restraining order and a writ of injunction pendente lite and perpetual, but also a writ of subpœna of the United States of America, directed to the said City of Chicago, Illinois Central Railroad Company, South Park Commissioners, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, commanding them, and each of them, to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the

Court shall seem meet and be required by the principles of equity and good conscience.

JOHN WILLIAMS, *Chief;*
MICHAEL WILLIAMS,
Secretary;
THOMAS TOPASH,
Chairman Business Committee;
ISAAC AUGUSTA,
FRANK SAWALK,
ARTHUR A. LEXIS,
LEWIS BALZIEL, AND
STEPHEN TOPASH,
Members of the Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians.
By W. W. DE ARMOND AND
J. G. GROSSBERG,
Their Solicitors.

W. W. DEARMOND AND J. G. GROSSBERG,
Solicitors for Complainants.

27 STATE OF MICHIGAN,
County of Cass, ss:

Michael Williams, being first duly sworn, on oath says that he is the duly authorized agent of the complainants named in the within bill of complaint; that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Signed) MICHAEL WILLIAMS.

Subscribed and sworn to before me this 6th day of April, A. D. 1914; and I hereby certify that under the laws of the State of Michigan I am duly authorized to administer oaths.

[SEAL.] (Signed) EDWARD S. McMASTER,
Notary Public.

My commission expires June 9, 1917.

J. C. M.

(Endorsed:) Filed April 7, 1914. T. C. MacMillan, Clerk.

28 EXHIBIT "A."

Be it ordained by the city council of the City of Chicago:

Section 1. That the city of Chicago hereby elects and determines to exercise the right, power and authority granted by an Act of the General Assembly of the State of Illinois, approved June 23, 1913, in force July 1, 1913, entitled "An Act to enlarge the power of cities

and villages in relation to harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all harbor structures, facilities, connections, improvements and utilities constructed or operated in connection therewith and for the purpose of carrying out such power to authorize the acquisition and condemnation of property and to authorize the use, occupation, recovery and acquisition of artificially made or reclaimed lands of the State and the reclamation and acquisition of the submerged lands of the State, and to repeal an Act entitled, 'An Act to enlarge the power of cities in relation to harbors, canals, wharves, docks, piers, slips and other harbor structures, facilities, improvements and utilities constructed or operated in connection therewith, to authorize the acquisition and condemnation of property and the use, occupation, reclamation and acquisition of the submerged lands of the State in carrying out such power, and to repeal all Acts or parts of Acts in conflict therewith,' approved June 10, 1911, and to repeal all other Acts or parts of Acts in conflict therewith."

Section 2. The city of Chicago for the purpose of carrying out the powers granted by the said Act of the General Assembly hereby defines and particularly describes the public waters, the submerged lands, the artificially made or reclaimed lands and other lands which shall constitute and shall be known as Harbor District Number 1, as follows:

Harbor District Number 1 shall include all of the Chicago river, including the main stream from its mouth to the forks, and the north branch and the south branch to the city limits, including all the public waters and submerged lands within and under said river and its branches aforesaid, and said Harbor District Number 1 shall also include all the territory, public waters, submerged lands, artificially made or reclaimed lands and other lands lying and being within the following boundaries, to-wit: Beginning at the south side of the Chicago river at the northeast corner of the old breakwater of the old United States Government life saving station, said point being the point of confluence of the Chicago river with Lake Michigan, thence extending in an easterly direction parallel to the north line of Randolph street extended, over the waters of Lake Michigan a distance of one (1) mile; thence extending in a northerly direction along a line running at right angles to said north line of Randolph street extended east to a point where said line intersects the north line of Chicago avenue extended east; thence extending in a westerly direction along the north line of said Chicago avenue extended east to the present shore line of Lake Michigan; thence running southeasterly and southerly following said shore line of Lake Michigan to the north line of Indiana street extended east to
29 the shore line of said Lake Michigan; thence west along the north line of Indiana street extended east to the east line of Peshtigo court as laid down and indicated on a plat of the Chicago Dock and Canal Company's Peshtigo Dock Addition in section ten (10), township thirty-nine (39) north, range fourteen (14) east of the third (3rd) principal meridian in Cook County, Illinois recorded September 17, 1889, in the Recorder's office of Cook

County, Illinois, as Document Number 1157023 in Book 39 of Plats, page 18; thence south along the east line of Peshtigo court seventy-four (74) feet, more or less, to the south line of Indiana street; thence east along the east line of Indiana street extended east nine hundred (900) feet, more or less, to the west line of the east one hundred (100) feet of lot seven (7) in the Chicago Dock and Canal Company's Peshtigo Dock Addition; thence south along the west line of the east one hundred (100) feet of said lot seven (7) two hundred and eighteen (218) feet, more or less, to the north line of Illinois street, extended east; thence west along the north line of Illinois street extended east nine hundred (900) feet, more or less, to the east line of Peshtigo court; thence south along the east line of Peshtigo court seventy-four (74) feet, more or less, to the south line of Illinois street; thence east along the south line of Indiana street extended east nine hundred (900) feet, more or less, to the west line of the east one hundred (100) feet of said lot seven (7); thence south along the west line of the east one hundred (100) feet of said lot seven (7) one hundred and fifty-eight (158) feet, more or less, to the north line of the Michigan slip; thence east along the north line of the Michigan slip to the wooden pier or breakwater at the southeast corner of said lot seven (7); thence in a southerly direction along the west line of said wooden pier or breakwater to the southeast corner of what is known as the United States Government North Pier; thence in a southwesterly direction nine hundred seventy-four (974) feet more or less, on a straight line to the northeast corner of the old breakwater of the old United States Government Life saving station, said last point being the place of beginning, a plat of which aforesaid public waters, submerged lands, artificially made or reclaimed lands, and other lands is hereto attached, marked "Exhibit A" and made a part hereof. All of the aforesaid submerged lands, artificially made or reclaimed lands and other lands and public waters are situated within the jurisdiction and corporate limits of the city of Chicago and are by this ordinance declared to be necessary and appropriate for the purposes in said Act enumerated.

Section 3. The city of Chicago hereby elects and determines to use, occupy or reclaim all such submerged lands, under the public waters of the State within the limits or jurisdiction of, or bordering on the city of Chicago, within said Harbor District Number 1 for the purposes in said Act enumerated, and all of the said submerged lands under the public waters of the State within said Harbor District Number 1 are declared by this ordinance to be necessary and appropriate for the purposes in said Act enumerated and by this ordinance authorized.

Section 4. The city of Chicago hereby elects and determines to take possession of, use and occupy for the purposes enumerated in said Act the artificially made or reclaimed lands (which before the artificial making or reclamation thereof constituted a portion of the submerged lands under the public waters of the State of Illinois), the title to which artificially made or reclaimed

lands is in the State of Illinois, and which are in said Harbor District Number 1 described as follows, to-wit:

Commencing at a point in the north line of Indiana street extending east nine hundred (900) feet east of the east line of said Peshtigo court, thence south five hundred fourteen (514) feet, more or less to the north line of Michigan slip; thence east one hundred (100) feet, more or less, to the east line of said lot seven (7) of the Chicago Dock and Canal Company's Peshtigo Dock Addition; thence north five hundred fourteen (514) feet, more or less, to the north line of Indiana street extended east; thence west one hundred (100) feet, more or less, to the place of beginning; also the wooden pier or breakwater extending in a southerly direction from the southeast corner of the above described tract of land and connecting same with what is known as the United States Government North Pier; and it is declared by this ordinance that the aforesaid artificially made or reclaimed lands, in this section particularly described, are necessary and appropriate for the purposes in the said Act enumerated; and the Corporation Counsel of the city of Chicago is hereby directed to bring and maintain all necessary suits, actions and proceedings, in the corporate name of the city of Chicago, against any person or corporation, private, public or municipal, for the recovery of the possession of the said artificially made or reclaimed lands for the uses and purposes enumerated in said Act and authorized by this ordinance, which lands when so acquired, shall be held, used and occupied by the city of Chicago subject to the conditions in said Act provided.

Section 5. The city of Chicago hereby elects and determines to take possession of, use and occupy for the purposes in said Act enumerated the artificially made or reclaimed lands (which before the artificial making or reclamation thereof constituted a portion of the submerged lands under the public waters of the State of Illinois) the title to which artificially made or reclaimed lands is in the State of Illinois and which are within said Harbor District Number 1 described as follows, to-wit:

Commencing on the north line of Indiana street at the intersection of the east line of Peshtigo court thence east nine hundred (900) feet, more or less, to the west line of the east one hundred (100) feet of lot seven (7) of the said Chicago Dock and Canal Company's Peshtigo Addition; thence south along the west line of the east one hundred (100) feet said lot seven (7) seventy-four (74) feet more or less to the south line of Indiana street extended east nine hundred (900) feet, more or less, to the east line of Peshtigo court; thence north along the east line of Peshtigo court seventy-four (74) feet, more or less, to the place of beginning; also
31 commencing in the north line of Illinois street at the intersection of the east line of Peshtigo court; thence east along the north line of Illinois street extended east nine hundred (900) feet, more or less, to the west line of the east one hundred (100) feet of said lot seven (7); thence south along the west line of the east one hundred (100) feet of said lot seven (7) seventy-four (74) feet, more or less, to the south line of Illinois street extended east;

thence west along the south line of Illinois street extended east nine hundred (900) feet, more or less, to the east line of Peshtigo court; thence north along the east line of Peshtigo court seventy-four (74) feet, more or less, to the place of beginning; and it is declared by this ordinance that the aforesaid artificially made or reclaimed lands in this section particularly described are necessary and appropriate as and for approaches to or connections with the harbor, harbor utilities and appurtenances authorized by the said Act and by this ordinance; and the Corporation Counsel of the city of Chicago is hereby directed to bring and maintain all necessary suits, actions and proceedings in the corporate name of the city of Chicago against any person or corporation, private, public or municipal, for the recovery of the possession of such artificially made or reclaimed lands, which lands, when so acquired, shall be held, used and occupied by the city of Chicago subject to the conditions in said Act provided.

Section 6. That it is advantageous and desirable for the city of Chicago to acquire for the purposes in said Act enumerated, the east one hundred (100) feet of lot seven (7) of the Chicago Dock and Canal Company's Peshtigo Dock Addition in section ten (10) town thirty-nine (39) north, range fourteen (14) east of the third (3rd) principal meridian in Cook County, Illinois, as per plat recorded September 17, 1889, in the Recorder's office of Cook County, Illinois, as Document Number 1157023 in Book 39 of Plats, page 18; the north seventy-four (74) feet of the west nine hundred (900) feet of said lot seven (7), said tract extending from the west line of the east one hundred (100) feet of said lot seven (7) to the east line of Peshtigo court; the south seventy-four (74) feet of the north three hundred and sixty-six (366) feet of the west nine hundred (900) feet of said lot seven (7), said tract extending from the west line of the east one hundred (100) feet of said lot seven (7) to the east line of Peshtigo court, together with all accretions and additions on the water side of said described tracts of land; and the wooden pier or breakwater extending from the southeast corner of said lot seven (7); and all riparian rights appurtenant to said described lands and pier or breakwater.

That the city of Chicago hereby accepts the offer of the Chicago Dock and Canal Company, to sell and convey by general warranty deed to the city of Chicago the above described east one hundred (100) feet of lot seven (7) of the Chicago Dock and Canal Company's Peshtigo Dock Addition in section ten (10) town thirty-nine (39) north, range fourteen (14) east of the third principal meridian in Cook County, Illinois, as per plat recorded September 17, 1889, in the Recorder's office of Cook County, Illinois, as Document Number 1157023 in Book 39 of Plats, page 18;

32 That the city of Chicago accepts the offer of the Chicago Dock and Canal Company to convey by special warranty deed the north seventy-four (74) feet of the west nine hundred (900) feet of said lot seven (7), said tract extending from the west line of the east one hundred (100) feet of said lot seven (7) to the east line of Peshtigo court to be dedicated by said Chicago Dock and Canal

Company as a public street; the south seventy-four (74) feet of the north three hundred and sixty-six (366) feet of the West nine hundred (900) feet, said tract extending from the west line of the east one hundred (100) feet of said lot seven (7) to the east line of Peshtigo court to be dedicated by the said Chicago Dock and Canal Company as a public street, together with all accretions and additions, if any, on the north and east sides of said described tract of land; and the wooden pier or breakwater extending from the southeast corner of said lot seven (7); and all riparian rights of said Chicago Dock and Canal Company appurtenant to said described lands, proposed street or streets or on the east side of said pier or breakwater; subject to the taxes for the year 1913 which are to be assumed and paid by the city of Chicago, further subject to the Chicago Dock and Canal Company's free and unobstructed rights of ingress and egress to the Michigan slip as now existing, further subject to the easement, if any, of the Chicago Railways Company in the north seventy-four (74) feet of said lot seven (7), further subject to the easement, if any, of the Chicago and Northwestern Railway Company to occupy with its tracks the portion of the south seventy-four (74) feet of the north three hundred and sixty-six (366) feet of the west nine hundred (900) feet of said lot seven (7) now occupied by said tracks with the right to extend said tracks to the west line of the east one hundred (100) feet of said lot seven (7) but not occupying a greater width of said strip of land than is now occupied by the tracks of said Company, and further subject to the obligation of the Chicago Dock and Canal Company under an agreement and bond with the United States Government to maintain the said breakwater connecting said lot seven (7) with the United States Government pier, which obligation the city of Chicago agrees to assume, for the sum of three hundred thousand dollars ($300,000.00);

That in accordance with the offer of the Chicago Dock and Canal Company, the city of Chicago shall issue and deliver in payment for the said lands, accretions, additions, breakwater and rights appurtenant thereto, the harbor construction bonds of the city of Chicago issued under authority of an ordinance passed February 19, 1912, at par in the amount of three hundred thousand dollars ($300,000.00);

That the City Comptroller is hereby authorized and directed to carry out and complete the purchase of said lands, accretions, additions, breakwater and rights appurtenant thereto upon the terms above set forth and to issue and deliver in payment therefor said harbor construction bonds of the city of Chicago to the amount of three hundred thousand dollars ($300,000.00) par value.

33 Section 7. That the city of Chicago proceed forthwith to acquire, own, construct, maintain and operate in, over and upon the aforesaid submerged lands, artificially made or reclaimed lands, or other lands, granted by said Act, or which may be acquired under the provisions of said Act, within said Harbor District Number 1, a passenger pier and a freight pier in accordance with plans hereunto attached, marked "Exhibit B" and made a part hereof, and all other necessary harbors, canals, slips, wharves, docks, levees, piers,

quay walls, breakwaters, and all appropriate harbor structures, facilities, connections and improvements, and in connection therewith such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental to transportation or railroad terminals, and all other necessary or appropriate terminal facilities.

Section 8. It shall be the duty of the Harbor and Subway Commission of the city of Chicago, subject to the provisions hereof, to take special charge and superintendence of all work to be done under the provisions of this ordinance. Said Harbor and Supway Commission shall award and execute all contracts for work, material or supplies of any kind or nature in connection with the work provided for in this ordinance. All contracts for any of such work, material or supplies where the amount of such contract exceeds five hundred dollars shall be let to the lowest reliable and responsible bidder after advertising the same. Advertisement shall be made and bids submitted and received by said Harbor and Subway Commission in the same manner as is provided for the letting of contracts in and by the provisions of The Chicago Code of 1911 concerning the letting of contracts by the department of public works. Bonds to be approved by said Harbor and Subway Commission shall be taken for the faithful performance of all such contracts. All contracts and bonds so taken shall be in the name of and run to the city of Chicago, and every contract for a sum greater than five hundred dollars shall have the approval in writing of the mayor endorsed thereon and shall be countersigned by the city comptroller. No contract shall be binding upon the city of Chicago, nor shall any work contracted for be commenced or any material or supplies delivered thereunder, until such contract has been duly executed and where such contract exceeds in amount the sum of five hundred dollars, until such contract has been approved and countersigned as aforesaid. All of the provisions of Article X of Chapter LVIII of The Chicago Code of 1911 shall apply to work done and material and supplies furnished under the provisions of this ordinance and to all contracts for such work, material and supplies, except that in all cases the powers conferred and duties imposed by said Article X upon the commissioner of public works shall in respect to said work, materials and supplies be exercised and performed by said Harbor and Subway Commission.

34 Section 9. No portion of any harbor, canal, slip, wharf, levee, dock, pier or other harbor utility or improvement (except breakwater) enumerated in said Act or by this ordinance shall be constructed within one-half (½) mile of any intake of water for public consumption, and in constructing such improvements no ashes, cinders or waste shall be dumped into said public waters within four (4) miles of any intake of water for public consumption unless placed behind retaining bulkheads.

Section 10. The city comptroller of the city of Chicago is hereby directed to and shall keep separate and distinct books of account, which shall show in true and complete form all expenditures made by the city of Chicago for and in connection with the acquisition,

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ownership, construction and maintenance of the piers and other harbor structures and utilities authorized by this ordinance to be constructed, up to the date of the completion of said piers, harbor structures and utilities; and the said city comptroller of the city of Chicago is hereby directed to and shall keep books of account for such piers, harbor structures and utilities separate and distinct from the other accounts of the city of Chicago and in such manner as to show the true and complete financial standing and results of ownership and operation by the city of Chicago and of the ownership and leasing by said city. Such accounts shall be so kept as to show the actual cost to the city of Chicago of such utilities owned; all cost of maintenance, extension and improvement; all operation expenses of every description, in case of such city's operation, whether of a whole or of a part of such utilities; if water or other service shall be furnished for the use of such utilities without charge, the accounts shall show, as nearly as possible, the value of such service and also the value of service, if any, rendered by such utilities to any other city department without charge; such accounts shall also show reasonable allowances for interest, depreciation and insurance, and also estimates of the amount of taxes that would be chargeable against such utilities if owned by a private corporation.

Section 11. During the period from and after the date upon which this ordinance becomes effective to the date of completion of the two aforesaid piers and other necessary harbor structures and utilities the said Harbor and Subway Commission of the city of Chicago shall as soon as practicable after the first day of each calendar month prepare and submit to the city council a report showing the work done during the preceding month and such other information as said Harbor and Subway Commission may deem proper or as may from time to time be required by the city council.

Section 12. That in so far as the provisions of any ordinance heretofore passed are in conflict with, inconsistent with, or repugnant to, any of the provisions of this ordinance, the provisions of this ordinance shall prevail.

Section 13. This ordinance shall take effect and be in force from and after its passage, approval and publication.

(Here follows map marked page 35.)

35½ & 36 (Endorsed:) Filed Nov. 11, 1913. T. C. MacMillan, Clerk.

* * * * * * *

37 And on to-wit: the first day of December, 1913, came the Commissioners of Lincoln Park by their solicitor and filed in the clerk's office of said court their certain Motion to dismiss the bill of complaint. Said motion is in words and figures following to-wit:

Motion by the Commissioners of Lincoln Park.

District Court of the United States, Northern District of Illinois, Eastern Division.

No. 133. In Equity.

JOHN WILLIAMS et al., Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,

vs.

CITY OF CHICAGO, THE COMMISSIONERS OF LINCOLN PARK, et al.

Motion by the Commissioners of Lincoln Park, Defendants in the Above Cause.

Now come The Commissioners of Lincoln Park, by Francis O'Shaughnessy, their solicitor, and move the court to dismiss the said bill as to these defendants, because, as appears from the face of the said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against
38 them, these defendants, are not stated and for the following points appearing from the face of the bill.

First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said Band, and of all others, if any, who are entitled to join therein with them, but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795, was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottowas, Chippewas, Putawatimes, Miamis, Eelriver, Weea's, Kickapoos, Painkashaws and Kaskaskias; and that the said Treaty of August 24, 1816, was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to

enforce the said Treaties, or any right for claim arising thereunder.

39 Second. It does not appear from the said bill that the right or title asserted by the complainants has been established at law but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fourth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from the said bill that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

40 Sixth. The facts in the said bill averred are indefinite and uncertain, in that it is not averred what part of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by the respective defendants, but in all such respects the said bill is uncertain and indefinite.

Seventh. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1796 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Eighth. The said Treaties, in so far as they vested in the complainants or the said Pokagon Band of Indians any of the said lands, were, long prior to the filing of said bill, supplanted by other Treaties with the said tribes, whereby all the rights, if any, acquired by the said complainants or the said tribes under said Treaties, were re-ceded to the United States.

Ninth. It appears from the facts averred in the said bill that the said title or claim of the complainants is founded upon certain Treaties between the United States and the Pottawatomie tribe or nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and

41 premises from the cessions made in the subsequent Treaties between the said tribes and the United States.

Tenth. It does not appear from the said bill that the said complainants have acquired, or could acquire, the said alleged title to the said lands.

Eleventh. It does not appear from the alleged facts set forth in said bill that the complainants, or either of them, have title to said premises, or any part thereof, either in law or in equity.

Twelfth. From the facts averred there is no equity in said bill. Wherefore, the said defendants move as aforesaid.

THE COMMISSIONERS OF LINCOLN PARK,
By FRANCIS O'SHAUGHNESSY, *Their Solicitor.*

FRANCIS O'SHAUGHNESSY,
Solicitor for Commissioners of Lincoln Park.

(Endorsed:) Filed Dec. 1, 1913. T. C. MacMillan, Clerk.

42 And on to-wit: the second day of December, 1913, came the Minneapolis, St. Paul and Sault Ste. Marie Railway Co., by its solicitor and filed in the clerk's office of said court its certain motion to dismiss the bill. Said motion is in words and figures following to-wit:

Motion to Dismiss.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity.

JOHN WILLIAMS et al., Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY CO., et al.

Motion by the Minneapolis, St. Paul and Sault Ste. Marie Railway Co., One of said Defendants.

Now comes the Minneapolis, St. Paul and Sault Ste. Marie Railway Co., by Daniel Byrnes, its solicitor, and moves the court to dismiss the said bill as to this defendant, because, as appears from the face of the said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant, are not stated, and for the following points appearing from the face of the bill.

43 First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said Band, and of all others, if any, who are entitled to join therein with them, but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795, was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eelriver, Wasa's, Wickapacs, Painkashaws and Kaskaskias; and that the said Treaty of August 24, 1816, was between the Commissioners of the United

States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to enforce the said Treaties, or any right for claim arising thereunder.

44 Second. It does not appear from the said bill that the right or title asserted by the complainants has been established at law but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fourth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from the said bill that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

45 Sixth. The facts in the said bill averred are indefinite and uncertain, in that it is not averred what parts of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by the respective defendants, but in all such respects the said bill is indefinite and uncertain.

Seventh. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Eighth. The said Treaties, in so far as they vested in the complainants or the said Pokagon Band of Indians any of the said lands, were, long prior to the filing of said bill, supplanted by other Treaties with the said tribes, whereby all the rights, if any, acquired by the said complainants or the said tribes under the said Treaties, were re-ceded to the United States.

Ninth. It appears from the fact averred in the said bill that the said title or claim of the complainants is founded upon certain Treaties between the United States and the Pottawatomie tribe or nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and premises

46 from the cessions made in the subsequent Treaties between the said tribes and the United States.

Tenth. It does not appear from the said bill that the said com-

plainants have acquired, or could acquire, the said alleged title to the said lands.

Eleventh. It does not appear from the alleged facts set forth in said bill that the complainants, or either of them, have title to said premises, or any part thereof, either in law or in equity.

Twelfth. From the facts averred there is no equity in said bill.

Wherefore, the said defendant moves as aforesaid.

DANIEL BYRNES,
Its Solicitor.

(Endorsed:) Filed Dec. 2, 1913. T. C. MacMillan, Clerk.

47 And on to-wit: the second day of December, 1913, came the Michigan Central Railroad Company by its solicitor and filed in the clerk's office of said court its certain motion to dismiss bill in words and figures following to-wit:

Motion by the Michigan Central Railroad Company, One of said Defendants.

District Court of the United States, Northern District of Illinois, Eastern Division.

133. In Equity.

JOHN WILLIAMS et al., Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

Motion by the Michigan Central Railroad Company, One of Said Defendants.

Now comes the Michigan Central Railroad Company, by Winston, Payne, Strawn and Shaw, its solicitors, and moves the court to dismiss the said bill as to this defendant, because, as appears from the face of the said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant, are not stated, and for the following points appearing from the face of the bill:

48 First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said band, and of all others, if any, who are entitled to join therein with them, but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795 was between the United States of America and the tribes of Indians called the Wyandots, Delaware,

Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eelriver, Wesa's Kickapoos, Painkashaws and Kaskaskias; and that the said Treaty of August 24, 1816, was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to enforce the said Treaties, or any right for claim arising thereunder.

Second. It does not appear from the said bill that the right or title asserted the complainants has been established at law, but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

49 Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fourth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from the said bill that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

Sixth. The facts in the said bill averred are indefinite and uncertain, in that it is not averred what part of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by the respective defendants, but in all such respects the said bill is indefinite and uncertain.

Seventh. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago river emptying into the southwest end of Lake Michigan, where a fort formerly stood.

50 Eighth. The said Treaties, in so far as they vested the complainants or the said Pokagon Band of Indians any of the said lands were, long prior to the filing of said bill, supplanted by other Treaties with the said tribes, whereby all the rights, if any, acquired by the said complainants or the said tribes under the said Treaties, were re-ceded to the United States.

Ninth. It appears from the facts averred in the said bill that the said title or claim of the complainants is founded upon certain Treaties between the United States and the Pottawatomie tribe or

nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and premises from the cessions made in the subsequent Treaties between the said tribes and the United States.

Tenth. It does not appear from the said bill that the said complainants have acquired, or could acquire, the said alleged title to the said lands.

Eleventh. It does not appear from the alleged facts set forth in said bill that the complainants, or either of them, have title to said premises, or any part thereof, either in law or in equity.

Twelfth. From the facts averred there is no equity in said bill.

Wherefore, the said defendant moves as aforesaid.

WINSTON, PAYNE, STRAWN & SHAW,
Sol'rs for M. C. R. R. Co.

(Endorsed:) Filed Dec. 2, 1913. T. C. MacMillan, Clerk.

51 And on to-wit: the second day of December, 1913, came the Cleveland, Cincinnati, Chicago & St. Louis Railway Company by its solicitor and filed in the clerk's office of said court its certain motion to dismiss the bill. Said motion is in words and figures following to-wit:

Motion of the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. to Dismiss Bill.

In the District Court of United States, Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS et al, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, et al.

Motion of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, One of said Defendants in Above-entitled Cause.

Now comes the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by Robert J. Cary and Bertrand Walker, its solicitors, and moves the court to dismiss the said bill as to this defendant, because, as appears from the face of said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant are not stated, and for the following reasons appearing from the face of said bill.

52 First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band

of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said Band, and of all others, if any, who are entitled to join with them, but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795, was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eeelriver, Wesa's Kickapoos, Painashaws and Kaskaskias; and that the said Treaty of August 24, 1816, was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to enforce the said Treaties, or any right for claim arising thereunder.

53 Second. It does not appear from said bill that the right or title asserted by the complainants has been established at law but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for said complainants.

Fourth. It appears from said bill that defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from said bill that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

54 Sixth. The facts in said bill averred are indefinite and uncertain, in that it is not averred what part of said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by the respective defendants, but in all such respects the said bill is uncertain and indefinite.

Seventh. It does not appear from said bill that said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Eighth. The said Treaties, in so far as they vested in the complainants or the said Pokagon Band of Indians any of the lands, were, long prior to the filing of said bill, supplanted by other Treaties

with the said tribes, whereby all the rights, if any, acquired by the said complainants or the said tribes under said Treaties, were receded to the United States.

Ninth. It appears from the facts averred in the said bill that the said title or claim of the complainants was founded upon certain Treaties between the United States and the Pottawatomie tribe or nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and
55 premises from the cessions made in the subsequent Treaties between the said tribes and the United States.

Tenth. It does not appear from the said bill that said complainants have acquired, or could acquire, the said alleged title to said lands.

Eleventh. It does not appear from the alleged facts set forth in said bill that the complainants, or either of them, have title to said premises, or any part thereof, either in law or in equity.

Twelfth. From the facts averred there is no equity in said bill.

Wherefore, the said defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, moves as aforesaid.

By ROBERT J. CARY,
BERTRAND WALKER,
Its Solicitors.

(Endorsed:) Filed Dec. 2, 1913. T. C. MacMillian, Clerk.

56 And on to-wit: the third day of December, 1913, came the South Park Commissioners by their solicitor and filed in the clerk's office of said court, their certain Motion to dismiss the bill. Said Motion is in words and figures following to-wit:

57 *Motion of South Park Commissioners to Dismiss Bill.*

District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity.

JOHN WILLIAMS et al., Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

Motion by the South Park Commissioners, One of said Defendants.

Now comes the South Park Commissioners, by Robert Redfield, its solicitor, and moves the court to dismiss the said bill as to this defendant, because, as appears from the face of the said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant, are not stated, and for the following points appearing from the face of the bill:

First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottowatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said Band, and of all others, if any, who are entitled to join therein with them, but in said bill it is in substance averred that the claim is for and on behalf of the said Pokagon Band of Pottowatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of
58 August 3, 1795, was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Wesa's, Kickapoos, Piankashaws and Kaskaskias; and that the said Treaty of August 24, 1816, was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to enforce the said Treaties, or any right for claim arising thereunder.

Second. It does not appear from the said bill that the right or title asserted by the complainants has been established at law, but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fourth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from the said bill that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws
59 of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

Sixth. The facts in the said bill averred are indefinite and uncertain, in that it is not averred what part of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are — possession by the respective defendants, but in all such respects the said bill is indefinite and uncertain.

Seventh. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Eighth. The said Treaties, in so far as they are vested in the com-

plainants or the said Pokagon Band of Indians any of the said lands were, long prior to the filing of said bill, supplanted by other Treaties with the said tribe, whereby all the rights, if any, acquired by the said complainants or the said tribes under the said Treaties, were receded to the United States.

Ninth. It appears from the facts averred in the said bill that the said title or claim of the complainants is founded upon certain Treaties between the United States and the Pottawatomie tribe or nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and premises from the cessions made in the subsequent Treaties between the said tribes and the United States.

60 Tenth. It does not appear from the said bill that the said complainants have acquired, or could acquire, the said alleged title to the said lands.

Eleventh. It does not appear from the alleged facts set forth in said bill that the complainants, or either of them, have title to said premises, or any part thereof, either in law or in equity.

Twelfth. From the facts averred there is no equity in said bill.

Wherefore, the said defendant moves as aforesaid.

By ROBERT REDFIELD,
Its Solicitor.

(Endorsed:) Filed Dec. 3, 1913. T. C. MacMillan, Clerk.

61 And on to-wit, the thirty-first day of December, 1913, came the Illinois Steel Company by its solicitor and filed in the clerk's office of said court, its certain motion to dismiss the bill. Said motion is in words and figures following to-wit:

Motion to Dismiss.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS et al., Members of the Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, ILLINOIS STEEL COMPANY, et al.

Motion by the Illinois Steel Company, One of said Defendants.

Now comes Illinois Steel Company, by Knapp & Campbell, its solicitors, and moves the court to dismiss the said bill as to this defendant, because, as appears from the face of the said bill, proper parties complainant are not joined, and facts sufficient to

62 constitute a valid cause of action in equity aganist it, this defendant, are not stated, and for the following points appearing from the face of the bill.

First. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians and bring their said action in behalf of themselves and of the members of said band and of all others, if any, who are entitled to join therein with them, but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795, was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Pottawatomies, Miamis, Eelriver, Wesa's, Kickapoos, Painkaskawas and Kaskaskias, and that the said Treaty of August 24, 1816, was between the Commissioners of the United States on the one part and the Chiefs and Warriors of the United Tribes of Ottawas, Chipepwas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters and on the southwest parts of Lake Michigan, and not with the said complainants or with the said Pokagon Band, and no sufficient fact is averred showing right in the complainants or the said Pokagon Band to enforce the said Treaties or any right for claim arising thereunder.

63 Second. It does not appear from the said bill that the right or title asserted by the complainants has been established at law, but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Third. It appears from the said bill that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined and that there is an adequate and sufficient remedy at law for the said complainants.

Fourth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged and that a complete and adequate remedy at law, if any, exists.

Fifth. It does not appear from the said bill that this court has jurisdiction of the said cause in that it is not shown by the facts averred that the case is one arising under the Constitution and laws of the United States or that it is between citizens of different states, and no other sufficient jurisdictional facts are averred.

64 Sixth. The facts in the said bill averred are indefinite and uncertain, in that it is not averred what part of the said lands described are upland and what part are submerged lands, lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by the respective defendants, but in all such respects the said bill is indefinite and uncertain.

Seventh. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago river, emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Eighth. The said Treaties in so far as they vested in the complain-

ants or the said Pokagon Band of Indians any of the said lands, were long prior to the filing of said bill supplanted by other Treaties with the said Tribe, whereby all the rights, if any, acquired by the said complainants or the said Tribes, when the said Treaties were receded to the United States.

Ninth. It appears from the facts averred in the said bill that the said title or claim of the complainants is founded upon cer-
65 tain Treaties between the United States and the Pottawatomie Tribe or Nation of Indians and other Tribes and there is no fact or circumstance alleged excepting or reserving the said lands and premises from the cessions made in the subsequent Treaties between the said Tribes and the United States.

Tenth. Whatever title or right to the lands claimed the complainants may have had, if any, they have long since lost by abandoning said lands.

Eleventh. The complainants have lost whatever title or right they may have had in said land, if any, by their long and unexcused delay in protecting their alleged title and right.

Twelfth. It does not appear from the said bill that the said complainants have acquired or could acquire the said alleged title to the said lands.

Thirteenth. It does not appear from the alleged facts set forth in said bill that the complainants or either of them have title to said premises or any part thereof, either in law or in equity.

66 Fourteenth. From the facts averred there is no equity in said bill.

Wherefore, the said defendant moves as aforesaid.

KNAPP & CAMPBELL,
Solicitors for Illinois Steel Company.

(Endorsed:) Filed Dec. 31, 1913. T. C. MacMillan, Clerk.

67 And on to-wit; the twenty-seventh day of April, 1914, came the City of Chicago by its solicitor and filed in the clerk's office of said court its certain motion to dismiss in words and figures following to-wit:

Motion to Dismiss.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS et al., Members of Business Committee of The Pokagon Band of Pottawatomie Nation of Indians.
vs.
CITY OF CHICAGO et al.

Motion by City of Chicago, One of the Defendants to Dismiss Amended Bill of Complaint.

Now comes the City of Chicago, one of the defendants herein, by William H. Sexton, Corporation Counsel, its solicitor, and moves the court to dismiss the said bill as amended as to this defendant, on the grounds that even if the matters and things in said bill contained be true, in such manner and form as the same are
68 therein set forth and alleged, the complainants have not in and by their bill as amended made or stated such a case as does or ought to entitle them to any such recovery or relief, as is thereby sought and prayed for, from or against this defendant, and for the following points appearing from the face of said bill as amended.

First. That proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant, are not stated.

Second. The parties complainant are individuals described as members of a Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said band, and of all others, if any, who are entitled to join therein with them, but in said bill as amended it is in substance averred that the claim is for and on behalf of the said Pokagon Band of Pottawotamie Indians, while it appears from the said bill and the alleged Treaties that the said Treaty of August 3, 1795 was between the United States of America and the tribes of Indians called the Wyndots, Delawares, Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Wesa's, Kickapoos, Piankashaws and Kaskaskias; and that the said Treaty of August 24, 1816 was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient fact is averred showing right in the complainants or the said
69 Pokagon Band to enforce the said Treaties, or any right for claim arising thereunder.

Third. It does not appear from the said bill as amended that the right or title asserted by the complainants has been established at law, but that the complainants are demanding relief in equity upon an alleged claim not heretofore by law established.

Fourth. It appears from the said bill as amended that the defendants are in possession of lands claimed by the complainants and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fifth. It appears from the said bill as amended that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists.

Sixth. It does not appear from the said bill as amended that this court has jurisdiction of said cause, in that it is not shown by the facts averred that the case is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

Seventh. The facts in the said bill as amended, averred are indefinite and uncertain, in that it is not averred what part of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are in possession by the respective defendants, but in all such respects the said bill is indefinite and uncertain.

70 Eighth. It does not appear from the said bill as amended that the said lands therein described are not part of the fourteen tract of land in Article III of said Treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood.

Ninth. The said Treaties, in so far as they vested in the complainants or the said Pokagon Band of Indians any of the said lands were, long prior to the filing of said bill, supplanted by other Treaties with the said tribe, whereby all the rights, if any, acquired by the said complainants or the said tribes under the said treaties, were re-ceded to the United States.

Tenth. It appears from the facts averred in the said bill as amended that the title or claim of the complainants is founded upon certain Treaties between the United States and the Pottawatomie tribe or nation of Indians and other tribes, and there is no fact or circumstance alleged excepting or reserving the said lands and premises from the cessions made in the subsequent Treaties between the said tribes and the United States.

Eleventh. It does not appear from the said bill as amended that the said complainants have acquired, or could acquire, the said alleged title to the said lands.

Twelfth. It does not appear from the alleged facts set forth in said bill as amended that the complainants, or either of them have title to said premises; or any part thereof, either in law or in equity.

Thirteenth. From the facts averred there is no equity in said bill as amended.

71 Wherefore, and for other good reasons appearing from said bill of complaint as amended, this defendant moves that said bill as amended be dismissed at complainants' costs and upon such other terms as may be just.

By WM. H. SEXTON,
Corporation Counsel, Its Solicitor.

JAMES G. SKINNER,
Assistant Corporation Counsel, of Counsel.

(Endorsed:) Filed Apr. 27, 1914. T. C. MacMillan, Clerk.

72 And on to wit: the twenty-seventh day of April, 1914, came the Illinois Central Railroad Company by its solicitors and filed in the clerk's office of said Court its certain Motion to dismiss Amended Bill. Said Motion is in words and figures following to-wit:

73 *Motion of Illinois Central Railroad Company to Dismiss Amended Bill.*

District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS, Chief, et al., Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
vs.
CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH PARK COMMISSIONERS, et al.

Amended Bill of Complaint.

Motion by the Illinois Central Railroad Company, One of said Defendants.

Now comes the Illinois Central Railroad Company, by W. S. Horton and J. G. Drennan, its Solicitors, and moves the court to dismiss the said Amended Bill of Complaint as to this defendant, because, as appears from the said bill, proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against it, this defendant, are not stated; and also for the following reasons appearing upon the face of said bill:

First. The parties complainant are individuals described as members of the Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, and bring their said action in behalf of themselves and of the members of said Band and of all others, if any, who are entitled to join therein with them; but in said bill it is in substance averred that the claim made is for and on behalf of the said Pokagon Band of Pottawatomie Indians; but it appears from the said bill and the alleged treaties that the said treaty of August

3, 1795 was between the United States of America and the tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws and Kaskaskias; that the said treaty of August 24, 1816 was between the Commissioners of the United States, on the one part, and the chiefs and warriors of the united tribes of Ottawas, Chippewas and Pottawatomies, residing on the Illinois and Milwaukee rivers and their waters, and on the southwest parts of Lake Michigan, and not with the said complainants, or with the said Pokagon Band; and no sufficient facts are averred showing right in the complainants or the said Pokagon Band to enforce the said treaties, or any right or claim arising thereunder.

74 Second. While said bill purports to be brought for the complainants and all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, "if any are entitled to join herein with them," it is not averred that other members of the said Pottawatomie Nation have an interest, nor is claim directly made therefor, nor is any reason or fact stated for failure to join in the said bill all persons for whom claim is made.

Third. It does not appear from the said bill that the right or title asserted by the complainants has been established at law; and on the contrary the complainants are demanding relief in equity upon an alleged claim of title not heretofore by law established.

Fourth. It appears from the said bill that the defendants are in possession of lands claimed by the complainants, and that as an appurtenance thereto are doing the acts sought to be enjoined, and that there is an adequate and sufficient remedy at law for the said complainants.

Fifth. It appears from the said bill that the defendants are in possession of the lands and premises for which title and claim is alleged, and that a complete and adequate remedy at law, if any, exists, and that the title of complainants, if any, in and to said lands, may be determined by suit at law.

Sixth. It does not appear from the said bill that this court has jurisdiction of the said cause, and it is not shown by facts averred that the cause is one arising under the Constitution and Laws of the United States, or that it is between citizens of different States, and no other sufficient jurisdictional facts are averred.

Seventh. The facts in the said bill averred are indefinite and uncertain, and it is not averred what part of the said lands described are upland and what part are submerged lands lying under the waters of Lake Michigan, or what part of the lands or premises are possessed by this defendant, or what part possessed by the respective defendants, but in all such respects the bill is indefinite and uncertain.

Eighth. It does not appear from the said bill that the said lands therein described are not part of the fourteenth tract of land in Article III of said treaty of 1795 ceded to the United States and in substance described as one piece of land six miles square at the mouth of the Chicago river emptying into the southwest end

75 of Lake Michigan, where a fort formerly stood; nor does it appear from any fact in the said bill averred that upon the

making of the said treaty the United States did not enter upon and take possession of the said piece of land six miles square so located, or that it has not, since that time, through the defendants, been in the possession thereof.

Ninth. The said treaties, in so far as they vested in the complainants, or the said Pokagon Band of Indians, or the said Pottawatomie Nation of Indians, any of the said lands by the said bill demanded, were, long prior to the filing of said bill, supplanted by other treaties with the said tribe or nation, whereby all the rights, if any, acquired by the said complainants, or the said band, nation or tribe, were receded to the United States.

Tenth. It appears from the facts averred in the said bill that the said title or claim of the complainants is founded upon certain treaties between the United States and the Pottawatomie tribe or nation of Indians, and other tribes; but it does not appear from any fact averred that by the said treaties, or any of them, the said complainants, or the said tribes or band, acquired the title to the said lands demanded, as alleged in the said bill. And by treaties subsequently made, of which judicial notice will be taken, the said Indian tribes or nations, re-ceded to the United States all the rights granted by the said treaties in said bill averred; and no fact or circumstance is alleged excepting or reserving the said lands and premises demanded from the cessions made in the said subsequent treaties.

Eleventh. Whatever right or title to the said lands and premises demanded complainants may have had, if any, has long since been lost by abandonment.

Twelfth. It is averred in the said bill that this defendant was given the right to construct its railroad along the said lands and premises in question, by an Act of the State of Illinois, approved February 10, 1851, and an ordinance of the City of Chicago, approved June 14, 1852, and that thereby this defendant was authorized to fill in portions of Lake Michigan now claimed by the complainants, and that under such authority this defendant did fill in portions of the said lake as was authorized by the State of Illinois and the City of Chicago. It further appears from the
76 said bill that the United States, State of Illinois and the City of Chicago and this defendant have for more than sixty years been exercising acts of possession and ownership over the said premises demanded, but no fact or excuse is alleged for failure of the complainants to begin their said suit or claim for said premises, or in any way excusing or explaining their laches in failing to protect their alleged claim and right.

Thirteenth. It does not appear from the said bill that the said complainants have acquired, or could acquire, the said alleged title to the said lands.

Fourteenth. It does not appear from the facts alleged in the said bill that the complainants, or either of them, have title to the said premises, or any part thereof, either in law or in equity.

Fifteenth. It appears from treaties between the United States and the said Indian tribes and the public laws of the United States subsequent to the treaties in the said amended declaration averred, that

all rights of the said Indian tribes to occupy or possess the said lands were surrendered and abandoned by the said tribes long prior to the commencement of the said suit.

Sixteenth. From the facts averred there is no equity in said bill. Wherefore, the said defendant moves as aforesaid.

W. S. HORTON,
J. G. DRENNAN,
Solicitors for Illinois Central Railroad Company.

(Endorsed:) Filed April 27, 1914, T. C. MacMillan, Clerk.

77 And on to-wit: the fourth day of May, 1914, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, Judge of said Court, appears the following entry to-wit:

133.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissioners, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

78 Now come the parties herein by their respective attorneys and the Court having considered and being now fully advised upon the respective motions of the defendants herein to dismiss the bill of complaint as amended,

It is ordered, adjudged and decreed that said motions to dismiss be and the same are hereby sustained, and that the bill of complaint as amended be and the same is hereby dismissed for want of equity at plaintiffs' costs and that the defendants have execution therefor.

79 And on to-wit: the twenty-ninth day of May, 1914, came the complainants in said entitled cause by their solicitor and filed in the clerk's office of said court their certain petition for appeal in words and figures following to-wit:

80 *Petition for Appeal.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissioners, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

The above named complainants John Williams, Chief; Michael Williams, Secretary; Thomas Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, conceiving themselves aggrieved by the order entered in the above entitled cause on the 4th day of May, 1914, do hereby appeal from the said order to the Supreme Court of the United States and they pray that this, their appeal, may be allowed and that a transcript of the record and proceedings and papers upon which said order was made duly authenticated, may be sent to the Supreme Court of the United States.

JOHN WILLIAMS, *Chief;*
MICHAEL WILLIAMS, *Secretary;*
THOMAS TOPASH,
Chairman Business Committee.
ISAAC AUGUSTA,
FRANK SAWALK,
ARTHUR A. LEXIS,
LEWIS BAZIEL, AND
STEPHEN TOPASH,
Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,
By W. W. DE ARMOND AND
J. G. GROSSBERG,
Their Solicitors.

Dated this 29th day of May, A. D. 1914.

(Endorsed:) Filed May 29, 1914. T. C. MacMillan, Clerk.

81 And on the same day to-wit: the twenty-ninth day of May, 1915, came the complainants in said entitled cause by their solicitor and filed in the clerk's office of said court their certain assignment of errors in words and figures following to-wit:

Assignment of Errors.

133.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, Appellants,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois to the Honorable George A. Carpenter, Presiding Judge.

82 And now come the said Appellants and make and file this their assignment of errors.

1. The said District Court erred in dismissing nisi the original bill of complaint filed in said District Court.

2. The said District Court erred in dismissing the bill of complaint as amended.

W. W. DE ARMOND AND
J. G. GROSSBERG,
Attorneys for Appellants.

(Endorsed:) Filed May 29, 1914. T. C. MacMillan, Clerk.

83 And on the same day to-wit: the twenty-ninth day of May, 1914, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, Judge of said court appears the following entry to-wit:

133.

JOHN WILLIAMS, Chief,
vs.
CITY OF CHICAGO et al.

Now come the complainants by their solicitor and present to the court their petition for appeal and assignments of error and move

the court for the allowance of an appeal to the Supreme Court of the United States to have reviewed the decree heretofore entered herein in May 4, 1914.

It is ordered by the court that said appeal be and the same is hereby allowed upon the complainants filing a bond in the sum of two hundred and fifty dollars ($250.00) with security to be approved by the court.

84 And afterwards to-wit: on the seventeenth day of August, 1914, there was filed in the clerk's office of said court in said entitled cause a certain Appeal Bond in words and figures following to-wit:

85 *Appeal Bond.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 133.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissioners, Illinois Steel Company, Lincoln Park Commissioners, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

Know all men by these presents that we John Williams, Chief; Michael Williams, Secretary; Thomas Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, all residing in the state of Michigan and George J. Haberer, are held and firmly bound unto the above named City of Chicago, Illinois Central Railroad Company, South Park Commissioners, Illinois Steel Company, Lincoln Park Commissioners, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company in the sum of Two Hundred and Fifty Dollars ($250.00) to be paid
86 to them, the said City of Chicago, Illinois Central Railroad Company, South Park Commissioners, Illinois Steel Company, Lincoln Park Commissioners, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company for the payment of which well and truly to be made, we bind ourselves

and each of us, our and each of our heirs, executors, and administrators severally, jointly and firmly by these presents.

Sealed with our seals and dated the 15th day of August, 1914.

Whereas the above named John Williams, Chief; Michael Williams, Secretary; Thomas Topash, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of Pottawatomie Nation of Indians have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause by the District Court of the United States for the Northern District of Illinois.

Now, therefore, the condition of this obligation is such that if the above named John Williams, Chief; Michael Williams, Secretary; Thomas Topash, Chairman Business Committee; Isaac Augusta, Frank Sakalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of the Pokagon Band of the Pottawatomie Nation
87 of Indians shall prosecute their said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN WILLIAMS, *Chief*; [SEAL.]
MICHAEL WILLIAMS, *Secretary*; [SEAL.]
THOMAS TOPASH, *Chairman, and* [SEAL.]
ISAAC AUGUSTA, [SEAL.]
FRANK SAWALK, [SEAL.]
ARTHUR A. LEXIS, [SEAL.]
LEWIS BAZIEL, [SEAL.]
STEPHEN TOPASH, [SEAL.]
Members of Business Committee,
By JACOB G. GROSSBERG,
WILLIAM W. DE ARMOND,
Their Duly Authorized Agents and Attorneys in Fact.
GEORGE J. HABERER. [SEAL.]

Signed and delivered and taken and acknowledged this — day of July, 1914, by William DeArmond and Jacob G. Grossberg as the duly authorized agents and attorneys in fact of the within named John Williams, Chief, Michael Williams, Secretary, Thomas Topash, Chairman Business Committee, Isaac Augusta, Frank Sawalk, Arthur A. Lewis, Lewis Baziel and Stephen Topash, members of the Business Committee of the Pokagon Band of the Pottawa-
88–90 tomie Nation of Indians, and by the within named George J. Haberer this — day of August, 1914, before me.

—— ——.

Approved by
F. A. GEIGER,
Judge of the District Court of the United States of the Northern District of Illinois.

(Endorsed:) Filed August 17, 1914. T. C. MacMillan, Clerk.

* * * * * * *

91 & 92 UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, a Municipal Corporation; Illinois Central Railroad Company, a Corporation, etc.; South Park Commissioners, a Municipal Corporation; Lincoln Park Commissioners, a Municipal Corporation; Illinois Steel Company, a Corporation, etc.; Michigan Central Railroad Company, a Corporation, etc.; Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation, etc., and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an Order allowing an appeal entered and filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois wherein John Williams, Chief; Michael Williams, Secretary; Thomas Topash, Chairman Business Committee; Isaac Augusta; Frank Sawalk; Arthur A. Lexis; Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomies Nation of Indians, are appellants and you are appellees, to show cause, if any there be, why the Decree rendered against the said Appellants as in the said Order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George A. Carpenter, United States District Judge, at Chicago, Illinois, this 3rd day of May, in the year of our Lord one thousand nine hundred fifteen (1915.)

GEO. A. CARPENTER, *Judge.*

93 Service of the within citation is hereby accepted this 8th of May A. D. 1915.

CITY OF CHICAGO,
By RICHARD S. FOLSOM,
Corporation Counsel, Solicitor.

Serivce of the within citation is hereby accepted this 8th day of May A. D. 1915.

ILLINOIS CENTRAL RAILROAD COMPANY
By W. S. HORTON, *Solicitor.*

Service of the within citation is hereby accepted this 6th day of May A. D. 1915.

SOUTH PARK COMMISSIONERS,
By ROBERT REDFIELD, *Solicitor.*

Service of the within citation is hereby accepted this 6 day of May A. D. 1915.

LINCOLN PARK COMMISSIONERS,
By FRANCIS O'SHAUGHNESSY, *Solicitor.*

Service of the within citation is hereby accepted this 6th day of May A. D. 1915.

ILLINOIS STEEL COMPANY,
By KNAPP AND CAMPBELL, *Solicitors.*

Service of the within citation is hereby accepted this 7th day of May A. D. 1915.

MICHIGAN CENTRAL RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Solicitors.

Service of the within citation is hereby accepted this 6th day of May A. D. 1915.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By GLENNON, CARY, WALKER & HOWE,
Solicitors.

Service of the within citation is hereby accepted this 10th day of May A. D. 1915.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By VROMAN, MUNRO & VROMAN &
S. A. WARE, *Solicitors.*

94 [Endorsed:] 133. Supreme Court of the United States. John Williams, Chief, et al., vs. City of Chicago, et al. Citation. Burkhalter & Grossberg, 72 W. Adams Street, Chicago. Filed May 11, 1915, at — o'clock — M. J. C. MacMillian, Clerk.

95 In the Supreme Court of the United States, October Term, A. D. 1915.

No. 467.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary; THOMAS TOPASH, Chairman Business Committee; Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel and Stephen Topash, Members of Business Committee of the Pokagon Band of Pottawatomie Nation of Indians, Appellants,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTH Park Commissioners, Lincoln Park Commissioners, Illinois Steel Company, Michigan Central Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, Appellees.

To Richard S. Folsom, Corporation Counsel, and Jas. C. Skinner, Assistant Corporation Counsel, Solicitors for City of Chicago; W. S. Horton, Solicitor for Illinois Central Railroad Company; Rob't Redfield, Solicitor for South Park Commissioners; John O'Shaughnessy, Solicitor for Lincoln Park Commissioners; Knapp & Campbell, Solicitors for Illinois Steel Co.; Winston, Payne, Strawn & Shaw, Solicitors for Michigan Central R. R.; Rob't J. Carey, Bertrand Walker, Solicitors for Cleveland, Cincinnati, Chicago & St. Louis R. R. Co.; John T. Byrnes, Hiner, Bunch & Latimer, Solicitors for Minneapolis, St. Paul and Sault Ste. Marie Railway Company:

Please take notice that the following portions of the record in the above entitled cause were incorporated into the transcript of record in the District Court of the United States, for the Northern District of Illinois, on appeal of said cause to the Supreme Court of the United States:

96 First. The Amended Bill of Complaint.

Second. Exhibits "A" and "B" to the original Bill of Complaint.

Third. The several motions to dismiss the Amended Bill of Complaint:

Fourth. The order of Court dismissing Amended Bill of Complaint:

Fifth. Petition for the allowance of Appeal:

Sixth. Assignment of errors:

Seventh. Order allowing appeal:

Eighth. Appeal bond and order approving same.

Ninth. Citation and proof of service thereof.

Take notice further that the Appellants consider all said portions or parts of the record necessary for the consideration of the case by the said Supreme Court.

Take notice that Appellants intend to rely upon the following

errors, to-wit:

First. The District Court erred in sustaining the several motions of Appellees to dismiss the amended bill of complaint:

Second. The District Court erred in dismissing said amended bill of complaint.

WILLIAM W. DE ARMOND,
JACOB G. GROSSBERG,
Solicitors for Complainants.

97 Copy of the within notice received this 29th day of July A. D. 1915.

CITY OF CHICAGO,
By RICHARD S. FOLSOM, *Solicitor.*

July 28th, 1915.

ILLINOIS CENTRAL RAILROAD COMPANY,
By W. S. HORTON, *Solicitors.*

July 29th, 1915.

SOUTH PARK COMMISSIONERS,
By ROBERT REDFIELD, *Solicitor.*

July 29, 1915.

LINCOLN PARK COMMISSIONERS,
By FRANCIS O'SHAUGHNESSY, *Solicitor.*

July 29, 1915.

ILLINOIS STEEL COMPANY,
By KNAPP & CAMPBELL, *Solicitors.*

July 29, 1915.

MICHIGAN CENTRAL RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Solicitors.

July 28, 1915.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.,
By W. S. HORTON, *Solicitors.*

July 29, 1915.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY,
VROMAN, MUNRO & VROMAN, *Solicitors.*

98 [Endorsed:] No. 467. In the Supreme Court of the United States, October Term, A. D. 1914. John Williams, et al., vs. City of Chicago, et al. Notice. Burkhalter & Grossberg, 72 W. Adams Street, Chicago.

99 [Endorsed:] File No. 24731. Supreme Court U. S., October term, 1915. Term No. 467. John Williams, etc., et al., Appellants, vs. The City of Chicago et al. Statement of errors to be relied upon and designation by appellant of parts of record to be printed, and proof of service of same. Filed July 31, 1915.

Endorsed on cover: File No. 24731. N. Illinois, D. C. U. S. Term No. 128. John Williams, Chief, Michael Williams, Secretary, et al., appellants, vs. City of Chicago, Illinois Central Railroad Company, et al. Filed May 15th, 1915. File No. 24731.

NOV 29 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 128.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary, *et al.*,
Appellants.

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

W. W. DEARMOND,
J. G. GROSSBERG,
Attorneys for Appellants.

CHAMPLIN LAW PRINTING CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 128.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary, *et al.*,

Appellants.

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

INTRODUCTORY STATEMENT.

This is an appeal from an order or decree of the District Court of the United States for the Northern District of Illinois dismissing on motion of defendants, a bill of complaint filed by appellants. This was equivalent to sustaining a demurrer to the bill under the former prac-

tice, and hence the question on this appeal is whether the allegations in the bill are sufficient to entitle the complainants to relief. The bill was filed by the tribal officers of the Pokagon Band of the Pottawatomie Nation of Indians on behalf of themselves, the band, and the nation, and of all others, if any who are entitled to join with them, and against the City of Chicago, several railroad companies, park commissions and the Illinois Steel Company, corporations, who occupy or have claim to portions of the submerged and reclaimed lands of Lake Michigan, the Indian title to which has never been extinguished. In principle this would also include an island formerly in the lake, east of the City of Chicago, but now joined to the mainland; but the bill does not specifically mention the island.

This Pokagon Band are the same group who, under the title of "the Pottawatomie of Michigan and Indiana" filed one of the petitions (#1133) which were under consideration by this court in the case *of Pam-to-Pee* v. *United States* and *Pottawatomie Indians* v. *United States,* 148 U. S. 691; but were not the ones referred to in the opinion of the court as having "no longer have any tribal organization." The fact of the tribal organization is averred in the bill and for the purpose of the motion to dismiss made in the court below and there sustained, will be assumed as a fact on this appeal.

The prayer of the bill is for injunction to restrain certain trespasses and seizures taking place and threatened of some of the land involved, to quiet title, and to declare invalid and unconstitutional certain statutes of Illinois and an ordinance of the

City of Chicago, passed in reliance on one of the statutes, by color of authority of which the trespasses and seizures were being committed. Complainants' title is at least partly based on the so-called Greenville Treaty of August 3, 1795, which was in the nature of a partition deed between the government and the Indians, and also on other treaties; and the ordinance and statutes are alleged to be in violation of this and of other treaties and laws of the United States, as depriving complainants of due process of law, and as in impairment of the obligation of contracts.

The lands are of great value; but it is a matter of public notoriety that the title to large tracts of them has been in much dispute, and the litigation as to one large portion, that claimed by the Illinois Central Railroad, has reached this court. (*I. C. R. R. Co.* v. *Chicago*, 146 U. S. 387.) The complainants were not a party to that litigation and hence are not precluded. Owing perhaps to this uncertainty as to the title, but few improvements of much value had been made on the land prior to the time when this bill was filed; and nearly all of them were made after the complainants had publicly asserted their claim and with knowledge or notice thereof (Transcript 5).

The history of the title claimed is concisely set up in the bill, which is comparatively brief and does not lend itself to much condensation; and we respectfully refer to the bill for a statement of the complainants' case (Transcript 1-12), rather than repeat the allegations here. But the nature of the title may be briefly summed up as the original In-

dian title (usually termed the perpetual right of occupancy) *plus* the title which the United States had in 1795: hence a title in fee simple, restricted solely by the provision that the lands shall be "sold only to the United States." As the land had been offered for sale to the government and the latter has refused to buy, the title resolves itself into one of absolute fee simple (Transcript 6). By the language of the treaty the United States "relinquished their claims" to the Indians, without any restriction or limitation whatever, other than that on alienation. And this title of the Indians has never been, in any manner, extinguished. All subsequent cessions by the Indians of land in Illinois bordering on Lake Michigan were by metes and bounds and ran to the shore line only.

It is complainants' contention that the substantive relief prayed in the bill may be granted even if the title be still one of occupancy, for that right is perpetual, and under the treaty is guaranteed to the complainants until sale "in the quiet enjoyment of their lands against all other white persons who intrude upon the same"; this is really, in substance, the language of a warranty deed in fee simple; and as there has been no sale, the *perpetual* period has not yet expired during which the Indians are entitled to invoke the protection of the United States against intruders, which they do by this proceeding

The foregoing really states the substance of the whole case, which in the opinion of appellants' counsel is quite simple, notwithstanding its seemingly far-reaching nature. If this had involved a small strip

worth only a few hundred or a few thousand dollars in Montana or Oklahoma where an Indian title is not a novelty, it is doubtful if a defense would have been made or thought of. Substantially, the claim of the defendants, as presented in the court below, is that, notwithstanding the seemingly plain language of the treaties, the Indians, firstly, had no title originally to any part of the Great Lakes, and that the Great Lakes were excepted from the relinquishment to them of the title to the Northwest Territory by the government; secondly, that if they did, they impliedly or by some general expressions used, ceded them in later treaties; or, thirdly, they lost their title by "abandonment," by laches, or by statutes of limitations. There is also some objection to the bill on such grounds as alleged improper parties, want of federal jurisdiction, want of equitable jurisdiction, insufficient description of the lands claimed, etc. The position of appellants is that both as to form and substance, defendants' contentions are in practically every instance either against the plain language of treaties or of statutory provisions, or else against definite, if not oft-repeated, decisions of this court.

Mr. Charles Henry Butler, the very able and learned reporter of the decisions of this court and author of "The Treaty-Making Power of Congress," had at one time occasion to abstract and analyze this title; and we give his abstract in full, as a comprehensive statement of appellants' title (Appendix A).

Part II of "The 18th Annual Report of the Bureau of American Ethnology to the Secretary

of the Smithsonian Institution" is a government publication dealing exclusively with Indian Land Cessions in the United States. This volume will hereafter be referred to as "Indian Land Cessions." *The part of Lake Michigan in question is not included in the Schedule of Cessions nor in any of the Maps of Cessions; and yet all cessions, the boundaries of which extend into the Great Lakes, are shown accordingly, both in the schedule and on the maps.* The cessions along the Illinois shore of Lake Michigan are numbered 78, 148, 177 and 187, and both the descriptions and maps show them as *running to the shore line only.* See pages 680-681, 722-723 and 750-751 of "Indian Land Cessions" and maps 17 and 18. Contrast these with descriptions and maps of cessions, of which the boundaries extend into the Great Lakes, viz., cessions numbered 53, 66, 111, 205, 219, 261, shown on pages 666-667, 674-675, 698-699, 756-757, 760-761, 776-777 and on maps 29, 64 and 49. The portion of Mitchell's map in question is here reproduced for two purposes: First, that of showing that Great Britain, the predecessor in title to the United States, recognized the Indian ownership in the lakes as well as the upland (for *the then supposed boundary line was run through the lakes*); and second, that Great Britain had never even claimed title in the western portion of Lake Michigan as against the Indians; and as stated in Mr. Butler's abstract or opinion of title (Secs. 2, 8) the correctness of this map has been admitted by the United States as well as Great Britain. (Treaty of London, Sept. 29, 1827, U. S. Treaties and Constitutions, 1889.)

In addition to the foregoing, therefore, and to the bill and exhibits printed in the transcript of the record, we present as part statement of our case or for purposes of reference the following, printed as an Appendix to our brief and argument.

A. Mr. Butler's abstract or analysis of the Indian title.

B. The Greenville Treaty of August 3, 1795, omitting only the names signed to it.

C. The pertinent portions of the several Illinois statutes complained of under which the several defendants claim title or threaten to make seizures.

D. A pertinent part of Mitchell's map, agreed upon as authentic by the American and British Governments in article IV of the Treaty of London, September 29, 1827.

E. Maps of cessions in the Northwest Territory from the Indians to the United States, which touch or embrace any portion of the Great Lakes, being photographic copies from "Indian Land Cessions."

Error Relied On.

The District Court erred in dismissing the bill of complaint as amended.

BRIEF.

I.

The primary title to the country known to history as the Northwest territory, whatever the nature of that title, was in the Indians.

Northern Pacific Ry. Co. v. *United States*, 227 U. S. 355, 366.

Johnson v. *M'Intosh*, 8 Wheat. 543, 547, 596.

Barker v. *Harvey*, 181 U. S. 481.

Mitchel v. *United States*, 9 Pet. 711, 754, *et seq.*

United States v. *Joseph*, 94 U. S. 614.

Fellows v. *Blacksmith*, 19 How. 366.

Worcester v. *Georgia*, 6 Pet. 515, 544, 545.

Indian Land Cessions, 535, 553, 554, 640.

American State Papers, Class II, Vol. I "Indian Affairs," pp. 13, 53.

II.

This title included lakes and rivers and their islands and the submerged lands as well as the upland.

Winters v. *United States*, 207 U. S. 564.

Treaty of Greenville, Art. 4 (2 Kappler, 41).

Knight v. *United Land Association*, 142 U. S. 161.

San Francisco v. *LeRoy*, 138 U. S. 656.

American State Papers, Class R.
American State Papers, Class R., Vol. 1, p. 573, 574.

III.

The treaty of cession of 1783 whereby the country was ceded by Great Britain to the United States, conveyed merely whatever claim or title Great Britain had, and was subject to that of the Indians. In other words, the United States acquired no greater title than Great Britain had before that.

Treaty of Peace of 1783.
Worcester v. *Georgia*, 6 Pet. 515, 544, 555.
Johnson v. *M'Intosh*, 8 Wheat. 543, 584.
United States v. *Percheman*, 7 Pet. 51, 86.
Mitchel v. *United States*, 9 Pet. 711, 734, 749, 754, 756.
Strother v. *Lucas*, 12 Pet. 410, 435.
Wilson v. *Wall*, 6 Wall. 83.
Holden v. *Joy*, 84 U. S. (17 Wall.) 211.
Francis v. *Francis*, 203 U. S. 233, 239.

IV.

The so-called Greenville Treaty of August 3, 1795, between the United States and the twelve Indian Nations or Tribes of the Northwest territory, was for practical purposes a deed in partition; and each party to the partition took an absolute fee simple title in the part deeded to him.

Greenville Treaty, Arts. 3, 4, 5.
Worcester v. *Georgia*, 6 Pet. 515, 553, 582.

Rutherford v. *Greene's Heirs*, 2 Wheat. 196.
New York Indians v. *United States*, 170 U. S. 1, 16, 20.
Libby v. *Clark*, 118 U. S. 250.
Winters v. *United States*, 207 U. S. 564, 576.
Jones v. *Meehan*, 175 U. S. 1, 10, 11, 12.
The Kansas Indians, 5 Wall. 737.
Choctaw Nation v. *United States*, 119 U. S. 1.
Choate v. *Trapp*, 224 U. S. 665, 675.
N. P. R. Co. v. *United States*, 227 U. S. 355, 366, 367.
United States v. *Rickert*, 188 U. S. 432.
Indian Land Cessions, p. 535.
Francis v. *Francis*, 203 U. S. 233, 239.
United States v. *Paine Lumber Co.*, 206 U. S. 467, 473.

V.

As between the twelve Indian nations who were party to the Greenville Treaty the land was held in severalty by the respective nations; and the land in question was the property of the United Nation of Ottawas, Chippewas and Pottamatomies, usually, though, referred to as the Pottawatomie Tribe or Nation.

Smithsonian Institute Bureau of American Ethnology, Vol. 2, Bulletin 30.
Treaty of St. Louis of August 24, 1816, 2 Kappler Indian Affairs, p. 132.
First Treaty of Chicago of August 29, 1821, *ibid*, p. 198.

Treaty of the Wabash of October 16, 1826, *ibid*, p. 273.

Treaty of St. Joseph of September 20, 1828, *ibid*, p. 294.

Treaty of Camp Tippecanoe of October 20, 1832, *ibid.*, p. 353.

Treaties of Tippecanoe River of October 26-27, 1832, *ibid.*, pp. 367, 372.

Second Treaty of Chicago of September 26, 1833, *ibid.*, p. 402.

Doe v. *Wilson*, 64 U. S. (23 How.) 457.

Pam-To-Pee v. *United States*, 148 U. S. 691.

VI.

Prior to 1871 there was no way of extinguishing the title to any Indian land except by conquest or by voluntary cession from the Indians to the Government.

Article 3, Ordinances of 1787.

2 Kappler Indian Affairs, p. 42.

United States v. 43 *Gals. of Whiskey*, 93 U. S. 188.

Annual Report of Commissioner of Indian Affairs for 1890 (page xxix).

Fellows v. *Denniston*, 5 Wall. 761.

New York v. *Dibble*, 21 How. 366.

VII.

All the cessions by the Pottawatomie Nation of Illinois lands bordering on Lake Michigan run to the shore of the lake only, and do not include any islands nor any part of the bed of the lake.

Treaty of St. Louis of August 24, 1816, 2 Kappler, 132.

Treaty of Prairie due Chien of July 29, 1829, 2 Kappler, 297.

Treaty of Chicago of September 26, 1833, 2 Kappler, 402.

Treaty of Camp Tippecanoe of October 20, 1832, 2 Kappler, 353.

VIII.

That by the Indian cessions of the Illinois uplands bordering on Lake Michigan it was not intended to include the islands or any part of the bed of the lake, is shown by the fact that the cessions of lands in the Northwest territory bordering on other parts of Lake Michigan and the other Great Lakes expressly included parts of the lakes, and the islands and boundaries of the cessions were run into and across the lakes as well as the uplands.

Winters v. *United States*, 207 U. S. 564.

United States v. *Winans*, 198 U. S. 371, 381.

Treaty of Greenville of Aug. 3, 1795, 2 Kappler's Indian Affairs, 2nd Ed., p. 40.

Treaty of Fort Industry of July 4, 1805, 2 Kappler, 77, Art. II.

Treaty of Detroit of November 17, 1807, 2 Kappler, 93, Art. I.

Treaty of Miami of September 29, 1817, 2 Kappler, 145.

Treaty of Saginaw, Michigan, of September 24, 1819, 2 Kappler, 185.

Treaty of Washington of March 28, 1836, 2 Kappler, 450.

Treaty of Detroit of January 14, 1837, 2 Kappler, 482.

Treaty of LaPointe of Lake Superior of October 4, 1842, 2 Kappler, 542.

Mitchel v. *United States*, 9 Pet. 711, 749.

IX.

None of the other cessions of the lands of the Pottawatomies south of the Milwaukee River in Wisconsin and of the Grand River in Michigan, or for that matter, of any of the Indian Nations embraces the lands in question. (See No. VII, *ante*.) When a cession or a conveyance of upland is bounded by the shore of a stream or lake the ownership of the bed or submerged lands is separated from that of the upland and remains in the previous owner.

People v. *Board of Supervisors*, 125 Ill. 9, 23.

Producers Oil Co. v. *Hanzen*, 238 U. S. 325, 338.

Farnham on Waters and Water Rights, Secs. 837, 849, 857, 858, 861.

Chicago v. *Ward*, 169 Ill. 392, 406.

Angel on Water Courses, Sec. 41.

Martin v. *Waddell*, 41 U. S. (16 Pet.) 410.

Pollard v. *Hagan*, 44 U. S. 229.

Gould on Waters, Secs. 32, 155, 200, 202.
Fuller v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
Trustees of Schools v. *Schroll*, 120 Ill. 509.
Hardin v. *Shedd*, 177 Ill. 123.
Child v. *Starr*, 4 Hit. (N. Y.) 369.
Hardin v. *Jordan*, 140 U. S. 371.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471 (affirmed in 176 U. S. 646).
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.
Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bates v. *Illinois Cent. R. R. Co.*, 1 Black (66 U. S.) 204.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
Handly v. *Anthony*, 5 Wheat. 374.

X.

Nothing passes in an Indian treaty by implication; on the contrary, the most clear and unambiguous term must be employed. All that is not expressly conveyed is reserved, and if ambiguities occur they must be resolved from the standpoint of the Indians.

Winters v. *United States*, 207 U. S. 564, 576.
Worcester v. *Georgia*, 6 Pet. (31 U. S.) 515, 582.

Jones v. *Meehan,* 175 U. S. 1, 10, 11, 12.
Kansas Indians, 5 Wall, 737, 760.
Choctaw Nation v. *United States,* 119 U. S. 1, 27, 28.
Choate v. *Trapp,* 224 U. S. 665, 675.
Northern P. R. Co. v. *United States,* 227 U. S. 355, 366, 367.
United States v. *Rickert,* 188 U. S. 432, 443.
Woodward v. *De Graffenfried,* 238 U. S. 234.

XI.

It is not allowable to interpret what has no need of interpretation.

Vattel's Maxims for Interpreting Treaties.
Law of Nations, Book 2, Chap. 17.

XII.

Where a construction in a treaty had been adopted by the parties it should be followed.

Patterson v. *Jenks,* 2 Pet. 216, 230, 231.
2 Kappler, 40.

XIII.

By recognizing in numerous treaties subsequent to that of Greenville the Indian title to the lakes, rivers and islands in the Northwest Territory, both the Government and the Indians have construed the Greenville Treaty as embracing the islands and submerged lands of Lake Michigan.

Treaty of Greenville, Art. V, 2 Kappler, 42.
Shanks v. *Dupont,* 3 Pet. 242.

28 Am. & Eng. Ency. of Law, page 519 (2nd Ed.).

Patterson v. *Jenks*, 2 Pet. 216, 230.

XIV.

Circumstances existing at the time of making the treaty may be considered.

Strother v. *Lucas*, 12 Pet. 410, 438.

United States v. *Clark*, 8 Pet. 436, 462.

United States v. *Winans*, 198 U. S. 371, 381.

Winters v. *United States*, 207 U. S. 564, 576.

XV.

A construction placed upon a treaty provision by Government officers whose duty it is to construe and apply them, is entitled to great weight.

Patterson v. *Jenks*, 2 Pet. 216, 229, 230.

S. Paul, etc. Ry. Co. v. *Phelps*, 137 U. S. 528.

XVI.

But even if the construction or the policy of Department officers had been otherwise, the rights of the complainants would not have been affected, for a supposed policy or practice of Congress or of any of the Government Departments cannot control or overcome the plain provisions of a statute, and hence of a treaty.

St. Paul, etc. R. Co. v. *Phelps*, 137 U. S. 528.

Clark v. *Akers*, 16 Kas. 166.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Best v. *Doe*, 85 U. S. 112.
Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. R. R. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192.
Franklin v. *Lynch*, 233 U. S. 269.
Jones v. *Meehan*, 175 U. S. 1, 32.
Wilson v. *Wall*, 6 Wall. 83, 89.
Reichert v. *Felps*, 6 Wall. 160.
Smith v. *Stephens*, 10 Wall. 321. 327.
Holden v. *Joy*, 17 Wall. 211, 247.
Choate v. *Trapp*, 224 U. S. 665, 677, 678.
Bartlett v. *United States*, 203 Fed. Rep. 410.
Terrett v. *Taylor*, 13 U. S. (9 Cranch.) 43.

XVII.

The foregoing rule applies to water as well as to land.

Winters v. *United States*, 207 U. S. 564.

XVIII.

Title in the complainants being established by virtue of the Greenville Treaty, the burden of showing that that title has been at any time divested is on the defendants.

U. S. Rev. Stat., Sec. 2126 (1 Kappler, 15).

XIX.

Even under ordinary rules of construction, a treaty should be construed the same as a statute, a contract, or an ordinary instrument in writing.

Tucker v. *Alexandroff*, 183 U. S. 424, 436.

Adams v. *Akerlund*, 168 Ill. 632, 638.
The Amiable Isabella, 6 Wheat. 1, 72.
U. S. v. *Percheman*, 7 Pet. 51.
Worcester v. *Georgia*, 6 Pet. 515, 553, 554.
St. Paul, etc. Ry. Co. v. *Phelps*, 137 U. S. 528.
New York Indians v. *U. S.*, 170 U. S. 1, 20.

XX.

Even under ordinary rules of construction, where land along the shore is clearly and rigidly fixed by deed or by survey, it will not be afterwards changed even by accretions.

Gould on Waters, Sec. 155.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.
Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
People v. *Board of Supervisors*, 125 Ill. 9, 23, 24.,
Farnham on Waters and Water Rights, Secs. 837, 849, 857, 858, 861.
Handly v. *Anthony*, 5 Wheat. 374.
Hardin v. *Shedd*, 177 Ill. 123.
Bates v. *Illinois Central R. R. Co.*, 1 Black, 204, 207.
Trustees of Schools v. *Schroll*, 120 Ill. 509, 518.
Stone v. *United States*, 2 Wall. 525.

XXI.

Even under ordinary rules relating to property in the bed of lakes and rivers, reclaimed or made land follows the title to the bed.

Farnham on Water and Water Rights, Sec. 845.

XXII.

In the case of large bodies of irregular shape like The Great Lakes, the title to submerged lands is separate and distinct from the title to the shore lands.

Chicago v. *Ward*, 169 Ill. 392, 406.
Fidler v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
People v. *Board of Supervisors*, 125 Ill. 9, 23.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471, affirmed in 176 U. S. 646.
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.
San Francisco v. *LeRoy*, 138 U. S. 656.
Knight v. *United States Land Assn.*, 142 U. S. 161.
Tripp v. *Spring*, 5 Sawy. (U. S.), 209, F. C. 14, 160.
Teschmacher v. *Thompson*, 18 Cal. 11.

Ward v. *Mulford*, 32 Cal. 365.
People v. *San Francisco*, 75 Cal. 388.
Valentine v. *Sloss*, 103 Cal. 215.
Mobile v. *Eslava*, 16 Pet. 234.
Richardson v. *Sullivan, etc. Co.*, 169 U. S. 128.

XXIII.

Even in the case of running streams or marshes, the conveyance of the shore line does not carry with it conveyance of the bed of the stream where the deed makes the water's edge the boundary line.

People v. *Board of Supervisors*, 125 Ill. 9.
Alabama v. *Georgia*, 23 How. 505, 515.
Stone v. *United States*, 2 Wall. 525.
Handly v. *Anthony*, 5 Wheaton, 374.
Niles v. *Cedar Point Club*, 175 U. S. 300.
United States v. *Pacheco*, 2 Wall. 587.

XXIV.

The rights of the Pottawatomies under the Greenville Treaty were again reiterated and reassured to them by the Treaty of St. Louis of 1816.

Treaty of St. Louis of Aug. 24, 1916, Art. III (2 Kappler, 133).

XXV.

The same assurance was renewed to them in the Treaty of Pottawatomie Creek June 5th and 17th, 1846.

Treaty of Pottawatomie Creek of June 5 and 17, 1846, Art. II, 2 Kappler, 558.

XXVI.

The assurance was repeated in Section 2079 of the Revised Statutes, enacted March 3, 1871.

Sec. 2079 R. S. (1 Kappler, 8).

Sec. 2013 R. S.

XXVII.

The restriction upon alienation contained in the Greenville Treaty relieves the Indians from the necessity or obligation of making any assertion or claim to title in or out of court, and their title is not affected or impaired by any Statute of Limitations, adverse possession (if any) or the rule of laches.

United States v. *Auger*, 153 Fed. 671.

Stephens v. *Smith*, 77 U. S. 321.

Schrimpscher v. *Stockton*, 183 U. S. 290, 299.

Pickering v. *Lomax*, 145 U. S. 310, 316.

United States v. *Noble*, 237 U. S. 74.

Henkel v. *United States*, 237 U. S. 43.

Clark v. *Akers*, 16 Kas. 166.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Best v. *Doe*, 85 U. S. 112.

Heckman v. *United States*, 224 U. S. 413, 446.

Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.

Mullen v. *Simmons*, 234 U. S. 192.

Franklin v. *Lynch*, 233 U. S. 269.

Worcester v. *Georgia*, 6 Pet. 515, 557.

Sheldon v. *Donohoe*, 40 Kas. 346.

Auditor General v. *Williams*, 94 Mich. 180.
Choate v. *Trapp*, 224 U. S. 665, 671.
O'Brien v. *Bugbee*, 46 Kas. 13.

XXVIII.

Until the extinguishment of the Indian title the land in question was not even taxable, nor would it be for five years thereafter under the provisions of the Ordinance of 1787, and under the Enabling Act for admitting Illinois as a state.

Wah-Pe-Man-Qua v. *Aldrich*, 28 Fed. 489.
Auditor General v. *Williams*, 94 Mich. 180.
Choate v. *Trapp*, 224 U. S. 665.
New Jersey v. *Wilson*, 7 Cranch, 164.
The Kansas Indians, 5 Wall. 737, 761.
United States v. *Rickert*, 188 U. S. 432.
1 Jones & Addington, Ill. Stat. Ann. 63. Sec. 8, Ordinance of 1787.
Blue Jacket v. *Com'rs of Johnson Co.*, 5 Wall. 737.
Fellows v. *Denniston*, 5 Wall. 761.

XXIX.

The Ordinance of 1787 is part of the fundamental law of Illinois, of substantially the same authority of the Constitution of the United States, and is part of the Supreme law of the land.

Enabling Act of April 18, 1818.

XXX.

The provisions of the Greenville Treaty are also part of the Supreme law of the land.

Article VI, Federal Constitution.

Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.

United States v. 43 *Gals. of Whisky,* 93 U. S. (3 Otto), 188.

Fellows v. *Blacksmith,* 19 How. 366, 372.

Orr. v. *Hodgson,* 4 Wheat. 453.

Choate v. *Trapp,* 224 U. S. 665.

XXXI.

An Indian treaty is at least a contract, and property rights thereby acquired are entitled to the same constitutional protection as any other property rights, and more so. Any State statute which is in violation of the constitutional provision or of treaty rights is void.

United States v. 43 *Gals. of Whiskey,* 93 U. S. (3 Otto), 188.

Fellows v. *Blacksmith,* 19 How. 366.

Orr v. *Hodgson,* 4 Wheat. 453.

N. J. v. *Wilson,* 7 Cranch. 164, 166.

Choate v. *Trapp,* 224 U. S. 665, 678.

Goodell v. *Jackson,* 20 Johns. 715.

Shulthis v. *McDougal,* 95 C. C. A. 615, 170 Fed. 529.

New York v. *Dibble,* 21 How. 366, 371.

XXXII.

Any statute or ordinance depriving or tending to deprive Indians of their property is also void under Article 3 of the Ordinance of 1787.

Article III, Ordinance of 1787.

XXXIII.

Even Government patents are void if in violation of Indian treaty rights.

Northern Pacific Ry. Co. v. *United States*, 227 U. S. 355, 358.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Stone v. *United States*, 2 Wall. 525.

Best v. *Doe*, 85 U. S. 112.

Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.

XXXIV.

The power to enforce treaty provisions is paramount and supreme, and rests in the Federal Courts upon every foot of soil within the boundaries of the United States.

U. S. v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 866, 893.

XXXV.

Even if this were not an Indian title, no mere claim of title, not accompanied by actual physical, adverse possession, held for the full period of the Statute of Limitations, could ripen into a title. Such a title manifestly cannot be set up as against submerged

land or recently reclaimed land, nor against vacant or unoccupied, nor against untaxed or untaxable land.

Wood on Limitations, 3rd Ed., Sec. 262.
2 C. J. 51, 53, 70.
Ward v. *Cochran*, 150 U. S. 597, 608.
Smith v. *Lee*, 1 Coldw. (Tenn.) 549, 552.
Bristol v. *Carroll County*, 95 Ill. 84, 93.
Farnham on Water and Water Rights, Sec. 837.
Middaugh v. *Fox*, 135 Ill. 344.
Lasker v. *McCreary*, 66 Fed. 841.
Ritchie v. *Sayers*, 150 Fed. 520.
Halstead v. *Grinnan*, 152 U. S. 412.
Moore v. *Crawford*, 130 U. S. 122.
Lurton v. *Rodgers*, 139 Ill. 554.
Sutherland v. *Reeve*, 151 Ill. 384.
Berry v. *Lovi*, 107 Ill. 612.
Hinds v. *Surbeck*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592, 603.
Galway v. *Met. Elev. R. Co.*, 13 L. R. A. 788; 128 N. Y. 132; Affg. 35 N. Y. S. R. 628.
Wood v. *McGuire*, 15 Ga. 202.

XXXVI.

All statutes of limitations are based upon the theory of laches and the theory of laches in its turn can be invoked only upon a state of facts where some detriment or prejudice had been suffered; and where the complainants have not expended in improvements and taxes in the excess of the rents or

benefits received on the land, neither laches nor the statute of limitations can be invoked.

Hinds v. *Surbee*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592.

XXXVII.

Both laches and the statute of limitations are affirmative defenses and to be availed of must ordinarily be pleaded.

1 Daniell's Ch. Pl. & Pr., 561.
Gormley v. *Bunyan*, 138 U. S. 623.

XXXVIII.

Even as against persons other than Indians the constructive possession of land is always in the holder of the best title.

2 Corpus Juris, 53.
Ward v. *Cochran*, 150 U. S. 597, 608.
Bristol v. *Carroll County*, 95 Ill. 84, 93.

XXXIX.

The doctrine of Constructive Possession under color of title cannot be extended to large tracts of land not taken for the ordinary purposes of cultivation and occupation.

Wood on Limitations, 3rd Ed., Sec. 262.

XL.

The depositing of material, etc., is not such possession.

2 Corpus Juris, 70, 71, 72.

XLI.

Even as against persons other than Indians, an adverse possession of the shore lands can never give right or title in the submerged lands.

Farnham on Water and Water Rights, Sec. 837.

2 Corpus Juris, 71, 72.

XLII.

The nature of the Indian title which existed prior to the Greenville Treaty is entirely immaterial, for courts cannot go behind a treaty.

Fellows v. *Blacksmith*, 19 How. 366.

United States v. *Paine Lumber Co.*, 206 U. S. 467.

Worcester v. *Georgia*, 6 Pet. 515, 593.

XLIII.

Even if some or all of the Pottawatomie Nation have become citizens that would not affect their title to the property.

An Indian retains all his rights to tribal property notwithstanding that he may have become a citizen.

1 Kappler on Indian Laws and Treaties, 23.

18 U. S. Rev. Stat. 402, Sec. 15.

Red Bird v. *United States*, 203 U. S. 76.

Tiger v. *Western Investment Co.*, 221 U. S. 286, 311.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 295, 300.

In re Heff, 197 U. S. 488, 503.

United States v. *Rickert*, 188 U. S. 432, 445.
United States v. *Flournoy Live Stock and Real Estate Co.*, 69 Fed. Rep. 886.
United States v. *Cherokee Nation*, 202 U. S. 101, 127.
United States v. *Old Settlers*, 148 U. S. 427, 481.
Heckman v. *United States*, 224 U. S. 413, 436.
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 560.
Pam-To-Pee v. *United States*, 148 U. S. 691, 699, 704, 705.
Smith v. *Swormstedt*, 16 How. 288, 302.
Sec. 2119 R. S. (1 Kappler, 35).
Lancaster v. *Kathleen Oil Co.*, 241 U. S. 531.
Equity Rules 23 and 38.

XLIV.

So long as treaties and laws remain in full force the judiciary power can exercise no discretion in refusing to give effect to those laws when questions arise under them, unless they shall be deemed unconstitutional.

Worcester v. *Georgia*, 6 Pet. 515, 594.
Fellows v. *Blacksmith*, 19 How. 366.

XLV.

Any and all acts of the defendants in seizing any of the lands in question, or even making valuable or lasting improvements thereon, cannot affect the title

of the complainants, for the defendants were bound to take notice of the Greenville Treaty and of its provisions.

Laughton v. *Nadeau*, 75 Fed. 789, 793.
United States v. *Carpenter*, 111 U. S. 347.
United States v. *Cook*, 86 U. S. 591.
Heckman v. *United States*, 224 U. S. 413, 446.

XLVI.

The fact that people invested or loaned money on land the title to which is in the Indians, does not give such parties any claim to such lands nor strengthen the title adversely to the Indians.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

XLVII.

None of the defendants can acquire title by mere acts of seizure or possession no matter how long continued. Even a direct conveyance to them by the Indians would have given them no title and they cannot acquire title indirectly which they could not have acquired by direct conveyance.

A conveyance made in violation of a treaty will not even create an equitable asset in the grantee, although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers*, 16 Kas. 166.
Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
Best v. *Doe*, 85 U. S. 112.

Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192, 198.
Franklin v. *Lynch*, 233 U. S. 269.
Northern Pacific R. Co. v. *U. S.*, 227 U. S. 355.

XLVIII.

If the United States is to be considered as Trustee for the Indians in their title to the land, then the rule applies that an agent or representative or official of a government cannot deprive it of property by taking its lands and having streets and highways thereon, or in other respect bind the government as to such lands.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
United States v. *Chicago*, 48 U. S. 185.
I. C. R. R. Co. v. *Illinois*, 146 U. S. 387.
United States v. *Morrison*, 203 Fed. 364.
Stone v. *United States*, 2 Wall. 525.
United States v. *Carpenter*, 111 U. S. 347.

XLIX.

A sole exception to the absolute right to soil in the Indians, even independently of the Treaty of Greenville, was that imposed by irresistible power which excluded them from intercourse with any other European potentate, and imposed restrictions upon alienation of their land accordingly.

Worcester v. *Georgia*, 6 Pet. 515, 559.

L.

"In the record of judicial determinations of this court there are few decisions of greater importance than those which were pronounced in *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 5 Pet. 515."

United States v. *Lariviere* (43 Gals. of Whisky), 93 U. S. 188.

LI.

The validity of a legislative act including treaties, depends in no degree on its containing the technical terms used in a conveyance.

Rutherford v. *Greene's Heirs,* 2 Wheat. 196, 198.

New York Indians v. *United States,* 170 U. S. 1, 16.

LII.

The *habendum* clause of a grant in a treaty as well as of a deed may explain, enlarge or qualify but cannot contradict or defeat the estate granted by the premises.

New York Indians v. *United States,* 170 U. S. 1, 20.

Worcester v. *Georgia,* 6 Pet. 515, 553.

2 Kappler, 41, 42.

LIII.

Title to the lands in question by the defendants, or any of them, directly or indirectly, could only have been acquired either from the United States or from

the State of Illinois. If the United States ever had any title prior to the admission of Illinois as a State, then that title passed to the State upon its admission. The only cession which had at that time been made by the Indians was the one by the Treaty of St. Louis in 1816, which, by its language and the survey made under it (reproduced in the record as page 35 and shown between pages 18 and 19 of the abstract) ran to the shore of Lake Michigan only. As the State upon its admission took only the title of the United States and has acquired none since then, it follows that the State could give no title to any of the defendants.

Illinois Cent. R. R. Co. v. *Illinois*, 146 U. S. 387.

Knight v. *United States Land Associations*, 142 U. S. 161, 185.

Shively v. *Bowlby*, 152 U. S. 1.

United States v. *Winans*, 198 U. S. 371, 382.

LIV.

There can be no claim of title upon the theory of abandonment. Affirmative action is required on the part of the Indians and also a legislative or judicial proceeding in the nature of an inquest of office to constitute an abandonment of title. Mere failure to assert title is not sufficient.

Mitchel v. *United States*, 9 Pet. 711, 742, 743, 749.

The New York Indians v. *United States*, 170 U. S. 1, 20.

Schulenberg v. *Harriman*, 88 U. S. 44.

Van Wyck v. *Knevals*, 106 U. S. 360.

Saint Louis, etc. Ry. Co. v. *McGee*, 115 U. S. 469.

Rowland & Heifner v. *Ladiga's Heirs*, 2 Ala. 9.

Indian Land Cessions, pp. 535, 539.

LV.

At least, cessation of occupancy must be in pursuance to agreemnet of cession to constitute abandonment.

Buttz v. *Northern Pac. R. R. Co.*, 119 U. S. 55.

LVI.

The claim of the defendants that the Indians parted with their title by the Treaty of Tippecanoe River of October 27, 1832, is not tenable. That Treaty, in conceding to the United States "their title and interest to lands in the States of Indiana, Illinois and in the Territory of Michigan *south of the Grand River,*" did not cede the lands in question. Millions of acres were still ceded by the Treaty of Chicago of September 26-27, 1833 (2 Kappler's Ind. Aff. 402.) What was ceded in the former treaty was the interest of the particular Bands to the lands ceded on the day previous by the other chiefs of the Pottawatomie Nation (2 Kappler's Ind. Aff. 367) and did not include the lands in question. Otherwise this cession would be void for uncertainty, as it is not by metes and bounds and does not state that *all* the lands in those states were ceded.

3 Washburn Real Prop., 622.

Hughes v. *Streeter*, 24 Ill. 648, 650.

U. S. v. *Heirs of Arredondo*, 13 Pet. 133, 135.

LVII.

The Government is bound to carry out the obligations of a treaty with the Indians in the same manner as an individual would be bound.

Crews v. *Burcham*, 1 Black, 352.
United States v. *Reese*, 5 Dill. 409, Fed. Cs. 16-137.
Choate v. *Trapp*, 224 U. S. 665, 674.

LVIII.

A court cannot amend a treaty by construction from general notions of convenience, etc.

The Amiable Isabella, 6 Wheat. 1.
Lattimer v. *Poteet*, 14 Pet. 4.
Society, etc. v. *New Haven*, 8 Wheat. 464.
Strother v. *Lucas*, 12 Pet. 410.
Chew Heong v. *United States*, 112 U. S. 536.
Tucker v. *Alexandroff*, 183 U. S. 424.

LIX.

Even treating the Indian title as one of permanent occupancy that title is superior to the title of the Government and limits necessarily its power of disposal.

Barker v. *Harvey*, 181 U. S. 481.
The New York Indians v. *United States*, 170 U. S. 1, 20.
United States v. *Joseph*, 94 U. S. 614.

Even the right of occupancy can be extinguished only by voluntary cession to the government.

U. S. v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
Buttz v. *Northern Pacific R. R. Co.*, 119 U. S. 55.

LX.

It is not enough that the complainants' ancestors had removed from the vicinity of the lands in question. Their removal without sale does not affect their title.

Fellows v. *Denniston*, 5 Wall. 761.
New York v. *Dibble*, 21 How. 366.
United States v. 43 *Gals. of Whiskey*, 93 U. S. (3 Otto), 188.
Choate v. *Trapp*, 224 U. S. 665, 678.
Cherokee Tobacco v. *United States*, 78 U. S. 616.

LXI.

The relation of guardian and ward which the United States government holds toward the Indians, does not confer upon it or upon Congress the right to confiscate Indian property, and such property is protected by the Fifth Amendment to the Constitution.

Choate v. *Trapp*, 224 U. S. 665, 678.

LXII.

If the Pottawatomie Nation be considered to have taken the land in question from the United States under the Greenville treaty, conditioned upon their "hunting and dwelling thereon," their ceasing to "hunt and dwell" thereon, if at all applicable to the

then submerged land, would constitute a condition subsequent, and as such, could be set up only by the grantor, the United States, and which the United States may waive.

Holden v. *Joy*, 84 U. S. (17 Wall.) 211.

See, also:

Buttz v. *N. P. R. R. Co.*, 119 U. S. 55.
Beecher v. *Wetherby*, 95 U. S. 517.
Schulenberg v. *Harriman*, 88 U. S. 44.
St. Louis, etc. Ry. Co. v. *McGee*, 115 U. S. 469.

LXIII.

A patent is not required to perfect a title given by a treaty.

Best v. *Doe*, 85 U. S. 112.

XLIV.

The courts of the United States will take judicial notice of treaties, public records, documents, etc.

Heath v. *Wallace*, 138 U. S. 573, 584.
New York Indians v. *United States*, 170 U. S. 1, 32.
Jones v. *United States*, 137 U. S. 202, 214.

XLV.

A suit is properly brought by a chief and tribal officers or respective members of a tribe or nation on behalf of an Indian Nation or tribe.

Cherokee Nation v. *Hitchcock*, 187 U. S. 307.
Lone Wolf v. *Hitchcock*, 187 U. S. 553.
United States v. *Old Settlers*, 148 U. S. 427.

This method is sustained partly to prevent a multiplicity of suits, *ibid.*

United States v. *Cherokee Nation*, 202 U. S. 101.

United States v. *Old Settlers*, 148 U. S. 427.

Smith v. *Swormstedt*, 57 U. S. (16 How.) 288, 302, 303.

LXVI.

The jurisdiction of a court of equity is sustained in a suit to prevent a cloud upon the title of an Indian tribe.

Lone Wolf v. *Hitchcock*, 187 U. S. 553, 560.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 295, 307.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Heckman v. *United States*, 224 U. S. 413.

United States v. *Rickert*, 188 U. S. 432, 444.

United States v. *Cherokee Nation*, 202 U. S. 101, 126.

United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 886, 890.

Kilbourn v. *Sunderland*, 130 U. S. 505.

Northern Pac. R. Co. v. *Smith*, 171 U. S. 260, 271, *et seq.*

United States v. *Old Settlers*, 148 U. S. 427.

Pam-To-Pee v. *United States*, 148 U. S. 691.

Kansas Indians, 5 Wall. 737.

Yellow Beaver v. *Commrs.*, 5 Wall. 757.

Wan-zop-e-ah v. *Commrs.*, 5 Wall. 759.

New York v. *Dibble*, 21 How. 366, 371.

LXVII.

Even if a question of whether or not the complainants are under tribal organization would affect their right to bring suit, that question is one, not for the courts, but for the Government; the tribal existence is alleged as a fact and cannot be questioned on demurrer, or a motion to dismiss, which is the equivalent of a demurrer.

The Kansas Indians, 5 Wall. 737.

United States v. *Holliday*, 3 Wall. 407, 419.

Brown v. *Steele*, 23 Kas. 530.

LXVIII.

It does not seem necessary to give status of tribal Indians that they reside upon common territory or that their lands shall be coterminous.

Ne-Hung-Go-Ne-Sia v. *State*, 36 Ind. 310, 316.

LXIX.

Bringing suit against numerous defendants to protect Indian title to lands is not multifarious.

Heckman v. *United States*, 224 U. S. 413, 448.

United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. 886, 887.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 300.

Equity Rule No. 38.

Choate v. *Trapp*, 224 U. S. 665.

LXX.

Jurisdiction in equity attaches unless the legal remedy both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would confer under the same circumstances.

Kilbourn v. *Sunderland*, 130 U. S. 505.
United States v. *Flournoy, etc. Co.*, 69 Fed. 886, 890.
Lancaster v. *Kathleen Oil Co.*, 241 U. S. 531.

LXXI.

Continued trespasses on real estate are grounds for injunction.

Evans v. *Victor*, 204 Fed. 361, 371.

LXXII.

A case arising from or growing out of a treaty is one involving rights given or protected by a treaty.

United States v. *Old Settlers*, 148 U. S. 427, 469.

LXXIII.

If in a suit in equity a matter ordinarily determinable at law arises such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court.

Equity Rule No. 23.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court one or more may sue or defend for the whole.

Equity Rule No. 38.

LXXIV.

Where the United States is not interested it is not a necessary party.

Hy-Yu-Tse-Mil-Kin v. *Smith*, 194 U. S. 401.
Heckman v. *United States*, 224 U. S. 413, 442, 446.

LXXV.

Those asserting title to land belonging to or occupied by an Indian tribe are not entitled to a jury trial under the Constitution.

New York v. *Dibble*, 21 How. 366.

ARGUMENT.

I.

THE PRIMARY TITLE TO THE COUNTRY KNOWN TO HISTORY AS THE NORTHWEST TERRITORY, WHATEVER THE NATURE OF THAT TITLE, WAS IN THE INDIANS.

That the primary title to the country known as the Northwest Territory antedated that of either the United States or Great Britain, or, for that matter, of France, and was in some nation or nations of Indians, will, we presume, readily be granted.

Mr. Cyrus Thomas, the able and scholarly author of the introduction to "Indian Land Cessions," states (p. 535) that in its dealings with the Indians "the United States has proceeded on the theory that *all* the land was held by natives." (Italics are in the original text.) As early as July 19, 1701, Great Britain formally recognized that title by making a treaty with the "Five Nations" in which the Indians ceded "the said tract of land or Colony, *lakes* and *rivers* and premises and every part and parcell thereof with their and every of their appurtenances unto our souveraigne Lord the King William the third," etc. (Indian Land Cessions, p. 553). The author then goes on to say "this was confirmed twenty-five years later by a substantial renewal of the deed, but limited in extent and made in the form of a trust, the granting clause being as follows: * * *

'And we Do allso of our own Accord free and Voluntary will Give Render Submit and Grant

> and by these presents do for our Selves our heirs & Successors Give Render Submit and Grant unto Our Said Sovereign Lord King George his heirs and Successors for Ever all that Land' (describing land conveyed). 'Including all the Castles of the aforesaid Three nations *with all the Rivers Creeks and Lakes* within the Said Limits,' etc." (p. 554).

The boundaries of this cession are shown on "Mitchell's Map," elsewhere referred to in this brief as being the map officially recognized as correct by both the British and American Governments. Part of this boundary runs *through Lake Michigan,* a few miles from its eastern shore, and runs out at the southern extremity at a point called "Quadoghe," also noted as "Bottom of the Lake," (the present site of Michigan City). Under the name "Quadoghe" appears the notation "so call'd by ye Six nations, ye extent of their territories, & Bounds of their Deed of Sale to ye Crown of Britain 1701, renewed in 1726 and 1744." This line is marked on the map "Western bounds of the Six Nations sold and surrendered to Great Britain." It is thus seen, both by the language of the cessions and by the official map, that Great Britain had not even *claimed* ownership of any kind to the lands in controversy in the present suit, but its claim was apparently a species of "Sphere of Influence."

Then Mr. Thomas goes on to say:

> "Although these cessions were made by the Indians solely for the purpose of placing themselves under the sovereignty and protection of the English Government, attempts were afterwards made to construe them as an absolute transfer of the Indian title, and grants were

made by the authorities for tracts in said territory. *This claim, however, was abandoned.*"

* * * * * *

"It appears by a report of the Lords of Trade, read before the Council at the Court of St. James November 23, 1761, and approved, the King being present, that the Government had at last been aroused to the necessity of paying regard to the Indians' rights, as shown by the following quotation therefrom: * * *

" 'It will be sufficient for the present purpose to observe that the primary cause of that discontent which produced these fatal Effects was the Cruelty and Injustice with which they had been treated with respect to their hunting grounds, in open violation of those solemn compacts by which they had yielded to us the Dominion, but *not the property* of those Lands.' "

On page 640 of the same work, Mr. Thomas, in commenting on the policy of the United States toward the Indians, says:

"By the proclamation of September 22, 1783, all persons were prohibited 'from making settlements on lands inhabited or claimed by Indians without the limits or jurisdiction of any particular state, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and direction of the United States in Congress assembled.' *It will be seen from this that the prohibition was not limited to lands in the actual use and possession of and occupied by the Indians, but extended to that claimed by them.*"

In *Northern Pacific Railway Company* v. *United States,* 227 U. S. 355, 366, Mr. Justice McKenna states in the opinion of the court, speaking of a cession of land not in question here:

"It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians."

The following was given as the finding of facts in *Johnson* v. *M'Intosh*, 8 Wheat. 543, 547:

"That at and before the commencement of the war in 1756, and during its whole continuance, and at the time of the treaty of February 10th, 1763, the Indian tribes or nations, inhabiting the country north and northwest of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami, were called and known by the name of the Western Confederacy of Indians, and were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each, which they had ceded to France, and she held under them, and among which were the aforesaid posts of Kaskaskias and Vincennes; and that these Indians, after the treaty became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property; the territories of the respective tribes being separated from each other, and distinguished by certain natural marks and boundaries to the Indians well known; and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil."

This case is frequently cited as establishing the doctrine that the Indian title is merely the perpetual right of occupancy or of possession. While if that be the nature of the title to the lands in question, this bill must be sustained, for that perpetual right has manifestly not yet expired, still, as we shall point out elsewhere in this brief, the doctrine of the *M'Intosh* case in this respect has no application to the case at bar. The Greenville Treaty has added the full Government title to that of the Indians, and, as we shall show elsewhere, left the Indians with an unqualified fee simple title, subject only to the restriction that the Indians may not convey to any one but the United States. The courts cannot go behind the Greenville Treaty.

Fellows v. *Blacksmith,* 19 How. 366.

In *Worcester* v. *Georgia,* 6 Pet. 515, 544, 545, it was said:

> "The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood."

Practically the entire opinion in this case is highly instructive on this point. Speaking of this case,

Justice Davis said [*United States* v. *Lariviere* (43 Gals. of Whisky), 93 U. S. 188]:

> "In the record of judicial determinations of this court there are few decisions of greater interest and importance."

> "So far as respected the authority of the crown, *no distinction was taken between vacant lands and lands occupied by the Indians.*"
>
> *Johnson* v. *M'Intosh*, 8 Wheat. 543, 596.

As there was no distinction between lands occupied and unoccupied, neither could there have been any distinction between islands, submerged lands and uplands.

Whatever title has passed to the Government is derived through the cession from the Indians.

Barker v. *Harvey*, 181 U. S. 481.

See, also:

Mitchel v. *United States*, 9 Pet. 711, 754 *et seq.*

United States v. *Joseph*, 94 U. S. 614.

II.

THIS TITLE INCLUDED LAKES AND RIVERS AND THEIR ISLANDS AND THE SUBMERGED LANDS AS WELL AS THE UPLAND.

Much of what is said under point I will be suitable to this proposition. That the Government has repeatedly recognized the Indian rights to the lakes and rivers as well as to the uplands, will appear more fully hereafter. It is sufficient to note at this time that this construction was manifested by numerous cessions from the Indians to the Government of

other parts of Lake Michigan and of parts of all the other Great Lakes in what was formerly known as the Northwest Territory. See Point VIII, *post.*

See also *Winters* v. *United States,* 207 U. S. 564.

In the Treaty of Greenville of August 3, 1795, Article Four, the language of cession of relinquishment from the United States to the Indians is defined to be "*according to the boundary line agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year* 1783."

2 Kappler Indian Affairs, 41.

This boundary line ran through the middle of Lakes Ontario, Erie, Huron and Superior, and the treaty left all of Lake Michigan to the Indians.

When territory is transferred from one government to another, the private right in tide lands as fixed by the rules of the former government will be respected by the new one.

Knight v. *United Land Association,* 142 U. S. 161.

San Francisco v. *LeRoy,* 138 U. S. 656.

We call attention to a report by Mr. Knox, Secretary of War, to President Washington, dated June 15, 1789, relative to the Northwestern Indians (American State Papers, Class II, Vol. I, "Indian Affairs," page 13):

> "*The Indians being the prior occupants, possess the right of the soil.* * * * Congress were of opinion that the treaty of peace of 1783 absolutely intended that with the fee of all the Indian lands within the limits of the U. S.; that they had a right to assign or retain such portions as they should judge proper. But it

> is manifest from the representations of the confederated Indians at the Huron village in December, 1786, that they entertained a different opinion, and that they were the only rightful proprietors of the soil."

To the same effect in his report of July 7, 1789 (p. 53).

On January 4, 1790, the secretary reported to the president (p. 61):

> "Were it enacted that the Indians possess the right to all their territory which they have not fairly conveyed and that they should not be divested thereof, but in consequence of open treaties made under the authority of the U. S. the foundation of peace and justice would be laid"; and again: "By the directions of Congress of the 2nd of July, 1788, to the governor of the Western territory to extinguish the Indian claims to lands they had ceded to the U. S. and to obtain regular conveyances of the same, it would appear, that *they conceded the Indian to the soil.*"

The defendants, however, contend that since the Treaty of Greenville describes the cession from the United States to the Indians as being (2 Kappler, 41): "all other Indian lands northward of the River Ohio, eastward of the Mississippi, and *westward and southward of the Great Lakes and the waters uniting them*, according to the boundary line agreed on by the United States and the king of Great Britain in the treaty of peace made between them in the year 1783," that the Great Lakes and the waters uniting them are thereby excluded from the relinquishment. Yet Gen. Anthony Wayne, known to historical fame as "Mad Anthony," in a

speech to the Indians, while negotiating the Treaty, on July 24, 1795, stated to them, after reading to them from the British American peace treaty of 1783:

> "There you perceive that all the country *south of the Great Lakes* has been given up to America." (American State Papers, Class R, relating to Indian Affairs, Vol. 1, p. 573.)

Did General Wayne mean thereby to tell the Indians that no part of the lakes had been "given up to America"?

Again on July 27, 1795, Gen. Wayne said to the Indians (same Volume, p. 574):

> "The British * * * ceded all the posts and possessions they then held or to which they had any claim, *south of the Great Lakes*, to the United States."

In explaining the Treaty to the Indians (2 Kappler, 39), he said:

> "I wish you clearly to understand the object of these reservations; they are not intended to annoy or impose the smallest degree of restraint on you in the quiet enjoyment and full possession of your lands."

Is it not evident that Gen. Wayne resorted to the plainest language that he could use which would be intelligible to the Indians that what was left to them was in fee simple absolute, including the lakes?

By the light of these speeches of Gen. Wayne to the Indians, it is evident that by the terms of parti- intended to express that the United States government relinquished to the Indians the entire title of the United States to all the land and water in the

Northwest Territory as fully as Great Britain had previously relinquished the same to the United States, excepting only what was expressly ceded to the United States. The only proviso to this relinquishment is the restriction against alienation.

III.

THE TREATY OF CESSION OF 1783 WHEREBY THE COUNTRY WAS CEDED BY GREAT BRITAIN TO THE UNITED STATES, CONVEYED MERELY WHATEVER CLAIM OR TITLE GREAT BRITAIN HAD, AND WAS SUBJECT TO THAT OF THE INDIANS. IN OTHER WORDS, THE UNITED STATES ACQUIRED NO GREATER TITLE THAN GREAT BRITAIN HAD BEFORE THAT.

The Treaty of Peace between the United States and Great Britain concluded in 1783 contains the following language of cession:

> "His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to be free, sovereign and Independent states; that he treats with them as such and for himself, his Heirs & Successors *relinquishes* all claims to the Government Proprietary and Territorial Rights of the same & every Part thereof."

The boundary line agreed on in this Treaty, as is well known, runs through the middle of Lakes Ontario, Erie, Huron and Superior as well as their connecting waters. By the very language of the Treaty, and as repeatedly held by the Supreme

Court, the conveyance of Great Britain merely amounted to a quit-claim, and the United States took no greater title than Great Britain had.

Chief Justice Marshall, in speaking of the relation of the Cherokee Nation with the United States, said in *Worcester* v. *Georgia*, 6 Pet. 515, 544, 555:

> "The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. * * * They assumed the relation with the United States which had before subsisted with Great Britain."

In *Johnson* v. *M'Intosh*, 8 Wheat. 543, 584, Chief Justice Marshall said:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitely to these states. We had before taken possession of them, by declaring independence; *but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled.*"

In *United States* v. *Percheman*, 7 Pet. 51, 86, Chief Justice Marshall said:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt

by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."

In *Michel* v. *United States*, 9 Pet. 711, 734, 749, 754, 756, Mr. Justice Baldwin said:

"A treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. * * *

"By thus holding treaties with these Indians, *accepting of cessions from them with reservations, and establishing boundaries with them,* the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties. * * *

"When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; nor did they take possession on any such assumption of right; on the contrary, it was done under the guaranty of Congress to the inhabitaants, without distinction,

of their rights of property, and with the continued assurance of protection. * * *

"On these considerations, we are clearly of the opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both and the sanctity of repeated treaties."

In *Strother* v. *Lucas,* 12 Pet. 410, 435, Justice Baldwin said:

"The State in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the Treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it (2 Peters, 301, &c.), by which this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants."

In *Wilson* v. *Wall,* 6 Wall. 83, the court said:

"When the United States acquired and took possession of the Floridas under the Louisiana Treaty, the treaties which had been made with the Indian Tribes remained in force over all the ceded territories as the laws which regulate the relations with all the Indians who were parties to them. They were binding on the United States as the fundamental laws of Indian right, acknowledged by royal orders and municipal regulations."

In *Holden* v. *Joy,* 84 U. S. (17 Wall.), 211, this court said:

"Unmistakably their (the Indians') title was *absolute,* subject only to the preemption right of purchase acquired by the United States as the

> successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs."

And in *Francis* v. *Francis*, 203 U. S. 233, 239:

> "The Indian title to the land reserved did not pass to the United States by the treaty, which operated as a release, by both the Indians and the government, of all interest either had in the lands reserved to the respective reservees, *in fee simple;* and it would be a violation of the treaty for the government to claim the land in question.

The conclusion is therefore irresistible that even independently of the Greenville treaty, the Indians had the full title and the United States only the ultimate right of purchase acquired from Great Britain.

IV.

THE SO-CALLED GREENVILLE TREATY OF AUGUST 3, 1795, BETWEEN THE UNITED STATES AND THE TWELVE INDIAN NATIONS OR TRIBES OF THE NORTHWEST TERRITORY, WAS FOR PRACTICAL PURPOSES A DEED IN PARTITION; AND EACH PARTY TO THE PARTITION TOOK AN ABSOLUTE FEE SIMPLE TITLE IN THE PART DEEDED TO IT.

Article Three of the Greenville Treaty reads as follows:

> "The general boundary line between the lands of the United States, and the lands of the said Indian tribes, shall begin at the mouth of Cayahoga river, and run thence," etc., and "the said Indian tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described."

This boundary line may be noted by inspection of the Map of Cessions in Ohio (Map 49) of Indian Land Cessions. The cession in question is No. 11.

The Indians also cede sixteen smaller pieces from the part reserved to them by the Treaty and four additional exceptions are made in Article Four of the Treaty. None of these reservations, however, includes the lands in question. The language of cession from the United States to the Indians in Article Four of that Treaty is as follows:

> "The United States *relinquish their claims* to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, *according to the boundary line agreed on by the United States and the king of Great Britain, in the treaty of peace made between them in the year* 1783."

It will be noted that the language of cession from the United States is by the use of the word "relinquish," being the identical expression used in the treaty of cession from Great Britain to the United States. Even if the Indians had had no title before, they would have by this treaty succeeded to the title of the United States, as the latter had to that of Great Britain. It is seen that each of the parties to that treaty, after describing the boundary line between their respective lands, parted with all title in the part ceded or relinquished. This relinquishment, therefore, plainly leaves in the Indians a fee simple title to the lands reserved to them, unless some qualifying words are elsewhere found in the treaty to detract from the full force and effect of a fee simple title, and the precise nature of the In-

dian title prior to that treaty becomes wholly immaterial. Such qualifying words it is claimed appear in Article Five of this treaty, which is as follows (2 Kappler Indian Affairs, p. 42):

> "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, *they are to be sold only to the United States; and until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

The first qualifying expression it is claimed consists in the following expression: "The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States." The first impression is not that these are words of limitation or derogation from the full grant, but are by way of a covenant of quiet enjoyment, of merely putting the habendum clause of a warranty deed into untechnical language. This first impression is not altered by any amount of research of the authorities. Thus, in *Worcester* v. *Georgia,* 6 Pet. 515, 553, Chief Justice Marshall says:

> "With respect to the words 'hunting grounds,' hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved. * * * These terms had been used in their treaties with Great Britain, and had never been misunderstood. *They had never been supposed to imply a right in the British government to take their lands,*" etc.

The validity of a legislative act including treaties depends in no degree on its containing the technical terms used in a conveyance.

> *Rutherford* v. *Greene's Heirs,* 2 Wheat. 196.
> *New York Indians* v. *United States,* 170 U. S. 1, 16.

The habendum clause in a treaty as well as in a deed, may explain, enlarge or qualify, but cannot contradict or defeat the estate granted by the premises.

> *New York Indians* v. *United States,* 170 U. S. 1, 20.

The language used in treaties with the Indians should never be construed to their prejudice.

> *Worcester* v. *Georgia,* 6 Pet. 515, 582.

In *Libby* v. *Clark,* 118 U. S. 250, Mr. Justice Miller said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. *The restriction on his right to convey did not deprive*

the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.'"

In *Winters* v. *United States,* 207 U. S. 564, 576, Mr. Justice McKenna said:

"By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

In *Jones* v. *Meehan,* 175 U. S. 1, 10, 11, 12, it was said by the court:

"In construing any treaty between the United States and an Indian Tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expres-

> sion, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.

The Kansas Indians, 5 Wall. 737.

The court, in *Choctaw Nation* v. *United States,* 119 U. S. 1, said:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.
>
> "The rules to be applied in the present case are those which govern public treaties, which, *even in case of controversies between nations*

equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

In *Choate* v. *Trapp*, 224 U. S. 665, 675, Mr. Justice Lamar, in his opinion, said:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years."

See also:

N. P. R. Co. v. *United States*, 227 U. S. 355, 366, 367.

United States v. *Rickert*, 188 U. S. 432.

"As will be seen when allusion is made to the policy of the nations in their dealings with the Indians there was some difference in regard to the extent of their right or title. This was limited by some of the governments to the territory occupied, while by others, as the United States, *it was usually allowed to extend to the territory claimed*, where the boundaries between the different tribes were understood and agreed on. It would seem, in fact, that the United States proceeded on the theory that *all* the land was held by natives."

Indian Land Cessions, p. 535.

This last statement is of course entirely incompatible with the idea of the Indian title being merely one of *pedis possessio*.

A claim is made further that the restriction upon alienation contained in this Article operates to limit or destroy the fee simple character of the title "relinquished." The holdings by this court have been uniformly the other way.

In *Francis* v. *Francis,* 203 U. S. 233, 239, Justice Harlan said:

> "The Indian title to the land reserved did not pass to the United States by the treaty, which operated as a release, by both the Indians and the government, of all interest either had in the lands reserved to the respective reservees, *in fee simple;* and it would be a violation of the treaty for the government to claim the land in question."

In *United States* v. *Paine Lumber Co.,* 206 U. S. 467, 473, Mr. Justice McKenna said:

> *"The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple,"*

citing *Libby* v. *Clark,* 118 U. S. 250. In the latter case it was said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. *The restriction on his right to convey did not deprive the title of the character of a fee simple estate.* 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.'"

It is plain, therefore, that, upon the execution of the Greenville treaty, the title to the lands in question was in the Indians, in fee simple.

V.

AS BETWEEN THE TWELVE INDIAN NATIONS WHO WERE PARTY TO THE GREENVILLE TREATY, THE LAND WAS HELD IN SEVERALTY BY THE RESPECTIVE NATIONS; AND THE LAND IN QUESTION WAS THE PROPERTY OF THE UNITED NATION OF OTTAWAS, CHIPPEWAS AND POTTAWATOMIES, USUALLY REFERRED TO AS THE POTTAWATOMIE TRIBE OR NATION.

In the article on Pottawatomies in Bulletin 30, Vol. 2, of "Smithsonian Institute Bureau of American Ethnology," is the following:

> "They (the Pottawatomies) were then moving southward and by the close of the seventeenth century established themselves on Milwaukee River at Chicago and on St. Joseph River, mostly in territory that had previously been held by the Miami By the beginning of the nineteenth century they were in possession of the country around the head of Lake Michigan, from Milwaukee River in Wisconsin to Grand River in Michigan, extending southwest over a large part of northern Illinois across Michigan to Lake Erie and south in Indiana to the Wabash, and as far down as Pine Creek."

As a matter of fact, the United States recognized the Pottawatomie title to all the lands bordering on Lake Michigan, described in the above Article, by taking cessions from the Pottawatomies or the United Nation of Ottawas, Chippewas and Pottawatomies. See the following Treaties:

Treaty of St. Louis of August 24, 1816, 2 Kappler Indian Affairs, p. 132.

First Treaty of Chicago of August 29, 1821, *ibid.* p. 198.

Treaty of the Wabash of October 16, 1826, *ibid.* p. 273.

Treaty of St. Joseph of September 20, 1828, ibid. p. 294.

Treaty of Camp Tippecanoe of October 20, 1832, *ibid.* p. 353.

Treaties of Tippecanoe River of October 26-27, 1832, *ibid.* pp. 367, 372.

Second Treaty of Chicago of September 26, 1833, *ibid.* p. 402.

All these cessions, however, it should be incidentally noted, extend to the shore of Lake Michigan only.

In *Doe* v. *Wilson,* 64 U. S. (23 How.) 457, it was said:

> "The Pottawatomie nation was the owner of the possessory right of the country ceded, and all of the subjects of the nation were joint owners of it."

See also *Pam-To-Pee* v. *United States,* 148 U. S. 691.

The Greenville treaty left the title, therefore, in the Pottawatomies, the complainant nation.

VI.

PRIOR TO 1871 THERE WAS NO WAY OF EXTINGUISHING THE TITLE TO ANY INDIAN LAND EXCEPT BY CONQUEST OR BY VOLUNTARY CESSION FROM THE INDIANS TO THE GOVERNMENT.

> "The utmost good faith shall always be observed toward the Indians. Their lands and properties shall never be taken from them without their consent; and in their property rights

and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."

Article Three, Ordinances of 1787.

"But when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and *until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands," etc.

2 Kappler Indian Affairs, p. 42.

"It is admitted that these Pembina Indians had the same right as other tribes to occupy their lands as long as they pleased, and that this right of occupancy could only be extinguished by voluntary cession to the Government."

United States v. 43 *Gals. of Whiskey,* 93 U. S. 188.

"According to the Annual Report of the Commissioner of Indian Affairs for 1890 (page xxix), 'From the execution of the first treaty made between the United States and the Indian tribes residing within its limits (September 17, 1778, with the Delawares) to the adoption of the act of March 3, 1871, that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," the United States has pursued a uniform course of extinguishing the Indian title only with the consent of those tribes which were recognized as having claim to the soil by reason of occupancy, such consent being expressed in treaties. * * * *Except only in the case of the Sioux Indians in Minnesota, after the outbreak of* 1862, *the Government has never extinguished an Indian title as by right of conquest; and in this case the Indians were pro-*

vided with another reservation, and subsequently were paid the net proceeds arising from the sale of the land vacated."

Indian Land Cessions, 640.

It is not enough that complainants' ancestors had removed from the vicinity of the lands in question. Their removal without sale does not affect their title.

Fellows v. *Denniston*, 5 Wall. 761.
New York v. *Dibble*, 21 How. 366.

VII.

ALL THE CESSIONS BY THE POTTAWATOMIE NATIONS OF ILLINOIS LANDS BORDERING ON LAKE MICHIGAN RUN TO THE SHORE OF THE LAKE ONLY, AND DO NOT INCLUDE ANY ISLANDS NOR ANY PART OF THE BED OF THE LAKE.

Following are the cessions and all the cessions by Indians of lands in Illinois bordering on Lake Michigan; all these cessions running to the shore of the lake only and including no part of the then submerged lands:

a. The Treaty of St. Louis of August 24, 1816, (2 Kappler 132) has the following language of cession:

> "The said chiefs and warriors, for themselves and the tribes they represent, agree to relinquish, and hereby do relinquish, to the United States, all their right, claim and title, to all the land contained in the before-mentioned cession of the Sacs and Foxes, which lies south of a due west line from the southern extremity of Lake Michigan to the Mississippi river. And they moreover cede to the United States all the land contained *within the following bounds*, to wit: beginning on the left bank of the Fox river of Illinois, ten miles above the mouth of said

Fox river; thence running so as to cross Sandy creek, ten miles above its mouth; thence, in a direct line, to a point ten miles north of the west end of the Portage, between Chicago creek, which empties into Lake Michigan, and the river Depleines, a fork of the Illinois; thence, in a direct line, *to a point on Lake Michigan, ten miles northward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of the said Chicago creek;* thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois river, to the mouth of Fox river, and thence to the beginning." This cession includes the site of Chicago.

b. The Treaty with the Chippewas, Ottawa and Pottawatomie Indians of the waters of Illinois, Milwaukee, and Minitoouck Rivers concluded at Prairie du Chien, in the territory of Michigan on July 29, 1829, in which is ceded:

"Beginning on the Western Shore of Lake Michigan, at the northeast corner of the field of Antoine Ouimette, who lives near Gross Pointe, about twelve miles north of Chicago; thence, running due west, to the Rock River, aforesaid; thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, *along the Western shore of said Lake, to the place of beginning.*" (2 Kappler 297.)

This cession is shown as No. 148, on map marked "Illinois 2."

c. The Treaty with the Chippewa, Ottawas and Pottawatomies at Chicago on the 26th day of Sep-

tember, 1833, in which the following was the cession to the United States (2 Kappler 402):

> "Article 1st.—The said United Nation of Chippewa, Ottawa, and Potawatomie Indians, cede to the United States all their land, *along the western shore of Lake Michigan,* and between this Lake and the land ceded to the United States by the Winnebago nation, at the treaty of Fort Armstrong made on the 15th, September 1832—bounded on the north by the country lately ceded by the Menominees, and on the south by the country ceded at the treaty of Prairie du Chien made on the 29th of July, 1829—supposed to contain about five millions of acres." (Cession 187, Maps "Illinois 2," "Wisconsin 1.")

d. The Treaty with the Pottawatomies at Camp Tippecanoe, October 20, 1832, in which the following cessions were made to the United States (2 Kappler, 353):

> "Article 1. The said Potawatomie Tribe of Indians cede to the United States the tract of land included *within the following boundary,* viz:
>
> Beginning at a point on Lake Michigan ten miles southward of the mouth of Chicago river, thence, in a direct line, to a point on the Kankakee river, ten miles above its mouth; thence, with said river and the Illinois river, to the mouth of Fox river, being the boundary of a cession made by them in 1816; thence, with the southern boundary of the Indian Territory, to the State line between Illinois and Indiana; thence, north with said line, *to Lake Michigan; thence, with the shore of Lake Michigan,* to the place of beginning." (Cession 177, Map "Illinois 1.")

VIII.

THAT BY THE INDIAN CESSIONS OF THE ILLINOIS UPLANDS BORDERING ON LAKE MICHIGAN IT WAS NOT INTENDED TO INCLUDE THE ISLANDS OR ANY PART OF THE BED OF THE LAKE IS SHOWN BY THE FACT THAT THE CESSIONS OF LANDS IN THE NORTHWEST TERRITORY BORDERING ON OTHER PARTS OF LAKE MICHIGAN AND THE OTHER GREAT LAKES EXPRESSLY INCLUDED PARTS OF THE LAKES AND THE ISLANDS, AND BOUNDARIES OF THE CESSIONS WERE RUN INTO AND ACROSS THE LAKES AS WELL AS THE UPLANDS.

There is first the general rule of construction of Indian cessions to the United States that everything is reserved that is not expressly ceded by the Indians, and this applies to water as well as land.

Winters v. *United States,* 207 U. S. 564.
U. S. v. *Winans,* 198 U. S. 371, 381.

The following treaties show cessions or reservations by the Indians and portions of the Great Lakes or of islands in those lakes:

First: The treaty of Greenville of August 3, 1795, and the language of the cession is as follows (2 Kappler's Indian Affairs, 2nd Ed., p. 40):

> "And for the same considerations and as an evidence of the returning friendship of the said Indian tribes of their confidence in the United States and desire to provide for their accommodation and for that convenient intercourse that will be beneficial to both parties the said Indian tribes do also cede to the United States the following pieces of land, to wit: * * *
>
> "13th. *The post of Michillimackinac and all the land on the island* on which that post stands

> and the main land adjacent of which the Indian title has been extinguished by gift or grant to the French or English Government; and a piece of land on the main to the North of the island to measure six miles on Lake Huron or the straits between Lake Huron and Lake Michigan and to extend three miles back from the water of the lake or strait *and also the island DeBois Blanc* being an extra and voluntary gift of the Chippewa Nation."

The former is now known as the Mackinac Island and *both are in Lake Huron.*

Second: In the Treaty of Fort Industry of July 4, 1805, with the Wyandot and other Indian Nations among them Pottawatomie Nation, the following establishes the boundary line between the United States and said Nation (2 Kappler 77, Art. II):

> Art. II. "The boundary line between the United States, and the nations aforesaid, shall in future be a meridian line drawn north and south, through a boundary to be erected on the south shore of lake Erie, one hundred and twenty miles due west of the west boundary line of the state of Pennsylvania *extending north until it intersects the boundary line of the United States,* and extending south it intersects a line heretofore established by the treaty of Greenville."

This cession is shown as No. 53 on the Map of Ohio in "Indian Land Cessions."

"Extending North until it intersects the boundary line of the United States" of course means North from the South shore of Lake Erie and hence running into the lake to such boundary line.

Third: In the Treaty of Detroit on November 17, 1807, with the Ottawa, Chippewa, Wyandot and

Pottawatomie Nations, the cession is as follows (2 Kappler 93, Art. 1):

> "Article 1. The sachems, chiefs, and warriors of the nations aforesaid, in consideration of money and goods, to be paid to the said nations, by the government, of the United States, as hereafter stipulated; do hereby agree to cede and forever quit claim, and do in behalf of their nations hereby cede, relinquish, and forever quit claim, unto the said United States, all right, title, and interest, which the said nations now have, or claim, or ever had, or claimed, in, or unto, the lands comprehended within the following described lines and boundaries; Beginning at the mouth of the Miami river of the lakes, and *running thence up the middle thereof* to the mouth of the great Au Glaize river, thence running due north, until it intersects a parallel of latitude, to be drawn from the outlet of Lake Huron, which forms the river Sinclair; thence running north east the course, that may be found, will lead in a direct line, *to White Rock, in Lake Huron, thence due east, until it intersects the boundary line between the United States and Upper Canada in said lake, thence southwardly, following the said boundary line, down said lake, through river Sinclair, lake St. Clair, and the river Detroit, into lake Erie,* to a point due east of the aforesaid Miami river, thence west to the place of beginning." (Cession No. 66 on Map "Michigan 1.")

Fourth: In the Treaty of Miami of Lake Erie with the Wyandot, Pottawatomie and other tribes on September 29, 1817, a cession of the Pottawatomies, Ottawas, and Chippewa tribes take in a portion of Lake Erie. (2 Kappler, 145.)

Fifth: In the Treaty of Saginaw, Michigan, September 24, 1819, with the Chippewas the Indian cession is as follows (2 Kappler 185):

"Art. 1. The Chippewa nation of Indians, in consideration of the stipulations herein made on the part of the United States, do hereby, forever, cede to the United States the land comprehended within the following lines and boundaries: Beginning at a point in the present Indian boundary line, which runs due north, from the mouth of the great Auglaize river, six miles south of the place where the base line, so-called, intersects the same; thence, west, sixty miles; thence, in a direct line, to the head of Thunder Bay River; thence, down the same, following the courses thereof, to the mouth; *thence, northeast, to the boundary line between the United States and the British Province of Upper Canada; thence, with the same, to the line established by the treaty of Detroit, in the year one thousand eight hundred and seven; thence, with the said line, to the place of beginning.*" (Cession 111, Map "Michigan 1.")

And the Indians make reservations as follows:

"Art. 2. From the cession aforesaid the following tracts of land shall be reserved, for the use of the Chippewa nation of Indians. * * * *One island in the Saginaw Bay.* * * *."

Sixth: In the Treaty of Washington of March 28, 1836, with the Ottawa and Chippewa Nations, the following was a cession to the United States (2 Kappler 450):

"Article First. The Ottawa and Chippewa nations of Indians cede to the United States all the tract of country within the following boundaries; Beginning at the mouth of Grand river of Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago on the 29th of August, 1821, thence, in a direct line, to the head of Thunder-bay river, thence with the line established by the treaty of Saga-

naw of the 24th of September, 1819, to the mouth of said river, *thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, thence northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's, to a point in Lake Superior north of the mouth of Gitchy Seebing, or Chocolate river, thence south, to the mouth of said river* and up its channel to the source thereof, thence, in a direct line, to the head of the Skonawba river of Green bay, thence down the south bank of said river to its mouth, thence, down the south bank of said river to its mouth, thence, in a direct line, *through the ship channel into Green bay,* to the outer part thereof, *thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east* to the place of beginning, at the cape aforesaid, comprehending all the *lands and islands,* within these limits, not hereinafter reserved. * * * (Cession 205, Map "Michigan 1.")

Article Third. There shall also be *reserved* for the use of the Chippewas living north of the straits of Michilimackinac, the following tract for the term of five years from the date of the ratification of this treaty, and no longer, unless the United States shall grant them permission to remain on said lands for a longer period, that is to say: Two tracts of three miles square each, on the north shores of the said straits, between Point-au-Barbe and Mille Coquin river, *including the fishing grounds in front of such reservations,* to be located by a council of the chiefs. *The Beaver islands of Lake Michigan for the use of the Beaver-island Indians. Round island, opposite Michilimackinac,* as a place of encampment for the Indians, to be under the charge of the Indian department. *The islands of the Chenos,* with a part

of the adjacent north coast of Lake Huron, corresponding in length, and one mile in depth. Sugar island, with its islets, in the river of St. Mary's. Six hundred and forty acres, at the mission of the Little Rapids. A tract commencing at the mouth of the Pississowining river, south of Point Iroquois, thence running up said stream to its forks, thence westward, in a direct line to the Red water lakes, thence across the portage to the Tacquimenon river, and down the same to its mouth, *including the small islands and fishing grounds*, in front of this reservation. Six hundred and forty acres, on Grand island, and two thousand acres, on the main land south of it."

Seventh: In the treaty of Detroit, January 14, 1837, with the Chippewas, among the cessions by the Indians are (2 Kappler 482):

One island in Saginaw Bay estimated at One Thousand acres being the island called "Shaingwaukokang" on which Mukokoosh formerly lived.

Eighth: In the Treaty of La Pointe of Lake Superior with the Chippewas, October 4, 1842, they made a cession to the United States as follows (2 Kappler 542):

"Article 1. The Chippewa Indians of the Mississippi and Lake Superior, cede to the United States all the country within the following boundaries; viz: Beginning at the mouth of Chocolate river of Lake Superior; *thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior, to the mouth of the St. Louis, or Fond du Lac river* (*including all the islands in said lake*); thence up said river to the American Fur Company's trading post, at the southwardly bend thereof, about 22 miles from its

mouth; thence south to intersect the line of the treaty of 29th July, 1837, with the Chippewas of the Mississippi; thence along said line to its southeastwardly extremity, near the Plover portage on the Wisconsin river; thence northeastwardly, along the boundary line, between the Chippewas and Menomonees, to its eastern termination (established by the treaty held with the Chippewas, Menomonees, and Winnebagoes, at Butte des Morts, August 11th, 1827) on the Skonawby river of Green Bay; thence northwardly to the source of Chocolate river; thence down said river to its mouth, the place of beginning; *it being the intention of the parties of this treaty, to include in this cession, all the Chippewa lands* eastwardly of the aforesaid line running from the American Fur Company's trading post on the Fond du Lac river to the intersection of the line of the treaty made with the Chippewas of the Mississippi, July 29th, 1837." (Cession 261, Maps "Wisconsin 1" and "Michigan 1.")

Paraphrasing somewhat the language of Justice Baldwin in *Mitchel* v. *United States,* 9 Pet. 711, 749, we may say, as applying to this case:

> "By thus holding treaties with these Indians, accepting of cessions from them (of portions of the Great Lakes) with reservations, in establishing boundaries with them (the King) the United States waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property (in the Lakes) which they could cede or reserve, and that the boundaries of (his) their territorial and proprietary rights should be such and such only as were stipulated by these treaties."

IX.

NONE OF THE OTHER CESSIONS OF THE LANDS OF THE POTTAWATOMIES NOR, FOR THAT MATTER, OF ANY OF THE INDIAN NATIONS, SOUTH OF THE MILWAUKEE RIVER IN WISCONSIN AND OF THE GRAND RIVER IN MICHIGAN (SEE NO. VII, ANTE), INCLUDES ANY PART OF LAKE MICHIVAN OR ITS ISLANDS. WHEN A CESSION OR A CONVEYANCE OF UPLAND IS BOUNDED BY THE SHORE OF A STREAM OR LAKE THE OWNERSHIP OF THE BED OR SUBMERGED LANDS IS SEPARATED FROM THAT OF THE UPLANDS AND REMAINS IN THE PREVIOUS OWNERS.

The law is entirely well settled, even as between white men, that the ownership of any of the land along any of the Great Lakes does not carry with it ownership of the bed of the lakes. Even in the case of running streams the conveyance to the shore line does not carry with it the conveyance of the bed of the stream where the deed makes the water's edge the boundary line. See *People* v. *Board of Supervisors*, 125 Ill. 9.

> "Facts and circumstances may be examined, and if they affirmatively disclose an intention to limit the grant to actually traverse lines, these must be treated as definite boundaries."
>
> *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325, 338.

A deed bounding the grant by the side of a stream excludes all common law right in the stream as a riparian proprietor.

> Farnham on Waters and Water Rights, Sec. 858.

In a conveyance calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land.

Chicago v. *Ward,* 169 Ill. 392, 406.

When land is conveyed bounded by a lake or pond the grant extends only to the water's edge.

Angel on Water Courses, Sec. 41.

No distinction is drawn in this country between public and private rights in great lakes.

Martin v. *Waddell,* 41 U. S. (16 Pet.) 410.

Pollard v. *Hagan,* 44 U. S. 229.

Gould on Waters, Sec. 32.

The title of riparian owners bounded by lakes extends to shore line only, for the body of water is called for as a boundary.

Fuller v. *Shedd,* 161 Ill. 462.

Seaman v. *Smith,* 24 Ill. 521.

Trustees of Schools v. *Schroll,* 120 Ill. 509.

The Illinois Supreme Court has refused to hold that a riparian owner is entitled to land left even by the recession of a small lake.

Hardin v. *Shedd,* 177 Ill. 123.

In *Child* v. *Starr,* 4 Hit. (N. Y.) 369, it was held that a boundary line running "eastwardly to the Genessee River, thence northwardly along the shore of said river," conveyed no part of the bed of the stream beyond low-water mark. The river was held to be excluded. This was followed by many other New York cases.

Gould on Waters, Sec. 200.

By the common law, parishes or towns upon tide waters, extend, like private estates, only to the highwater mark, unless proved by grant, prescription or usage to include the shore.

Ibid., Sec. 202.

The cases relating to lands under tide waters are equally applicable to navigable waters above the flow of the tide.

Hardin v. *Jordan*, 140 U. S. 371.

In the case of large bodies of irregular shape like the Great Lakes, the title to submerged lands is separate and distinct from the title to the shore lands.

Chicago v. *Ward*, 169 Ill. 392-406.
Fuller v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
People v. *Board of Supervisors*, 125 Ill. 9, 23.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471 (affirmed in 176 U. S. 646).
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.

When the land along the shore is clearly and rigidly fixed by deed or by survey it will not be afterwards changed even by accretions.

Gould on Waters, Sec. 155.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.

Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bates v. *Illinois Cent. R. R. Co.*, 1 Black (66 U. S.) 204.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
People v. *Board of Supervisors*, 125 Ill. 9.
Farnham on Waters and Water Rights, Sec. 837, 849, 857, 858, 861.
Handly v. *Anthony*, 5 Wheat. 374.

If such are the rules of ordinary conveyances between individuals or states, *a fortiori*, the rule of construction favoring the Indians would at least give the Indians the benefit of these rules. Furthermore, if the conveyances by the Indians of land to the shore only, or to the lake only, included islands and submerged lands in the lake, why should the Government have required in their treaties, as we have seen in number eight *ante*, the specific cession of the other parts of lakes and islands by metes and bounds running into those lakes, or else have procured express cessions of the various islands?

The cession of the shore lands by the Indians to the United States undoubtedly left the title to the bed and islands of this part of Lake Michigan, in the Indians.

X.

NOTHING PASSES IN AN INDIAN TREATY BY IMPLICATION; ON THE CONTRARY, THE MOST CLEAR AND UNAMBIGUOUS TERM MUST BE EMPLOYED. ALL THAT IS NOT EXPRESSLY CONVEYED IS RESERVED, AND IF AMBIGUITIES OCCUR THEY MUST BE RESOLVED FROM THE STANDPOINT OF THE INDIANS.

That the title to the islands and submerged lands in Lake Michigan were not included in the cessions by the Indians which ran to the lake shore only, is further aided by the foregoing rule that nothing passes in an Indian treaty by implication. What is not specifically conveyed, is reserved. Indeed, this is implied in the very words "Indian Reservation." It is but a restatement of the rule that all ambiguities in treaties with Indians are to be resolved in their favor. A number of expressions used by this court have already been noted under number IV *ante*. We will content ourselves by refering anew to the following cases:

Winters v. *United States*, 207 U. S. 564.
Jones v. *Meehan*, 175 U. S. 1, 10, 11, 12.
United States v. *Winans*, 198 U. S. 371, 380.
The Kansas Indians, 5 Wall. 737.
Choctaw Nation v. *United States*, 119 U. S. 1.
Choate v. *Trapp*, 224 U. S. 665, 675.
Woodward v. *De Graffenfried*, 238 U. S. 234.

XI.

IT IS NOT ALLOWABLE TO INTERPRET WHAT HAS NO NEED OF INTERPRETATION.

The foregoing is a familiar rule of construction not only between nations, but between individuals, and in construing constitutional provisions and legislative acts the Indians certainly, as a weaker people who are accorded all the benefits in construing doubtful language, are entitled to the benefit of the foregoing rule, where the import of the language is plain.

Under this rule we urge: First, that under the Treaty of Greenville (2 Kappler, 41) the Indians took everything south of the Canadian boundary line, hence including the bed of Lake Michigan, for the words "according to the boundary line agreed on by the United States and the king of Great Britain, in the treaty of peace made between them in the year 1783," have no need of interpretation. Second, that the nature of the title they took was one in fee simple, for the same Treaty provides (2 Kappler 42) that "when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until *such sale* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands," etc. Third: That it is also too plain for interpretation that when in the different cessions the shore of Lake Michigan was made the boundary line of those cessions, nothing was ceded beyond that boundary line; and hence the Indians did not part

with title to either the islands or submerged lands in the lake.

See Vattel's Maxims for Interpreting Treaties. Law of Nations, Book 2, Chap. 17.

XII.

WHERE A CONSTRUCTION IN A TREATY HAD BEEN ADOPTED BY THE PARTIES IT SHOULD BE FOLLOWED.

In *Patterson* v. *Jenks,* 2 Pet. 216, a question came up of the construction of some treaties between the State of Georgia and the Creek Indians. A real ambiguity was disclosed in those treaties. Chief Justice Marshall there said (page 230):

> "If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, we should not hestitate to adopt that construction in this case."

This was between parties entirely *sui juris,* but both claiming from the State of Georgia. Among other questions was one whether the *locus in quo* was within or without the Indian hunting ground. In the case at bar such construction is directly invoked by the Indians themselves. Has not the United States in numerous treaties recognized the Indian ownership in the Great Lakes within the boundaries of the Northwest Territory? In the very Treaty of Greenville itself the Indian title to the lakes is recognized by the Government accepting an express cession of certain islands in the lakes. See No. 13 among the pieces of land enumerated in that Treaty. (2 Kappler 40.) Also the language of subsequent cessions from the Indians enumerated

under Number VIII *ante*. We invoke this construction by the Government as of a character so conclusive that it would seem that no argument against that construction should be tolerated. The benefit of this rule of construction may, as we have seen, be invoked by a person entirely *sui juris*. It is a rule of construction that obtains as to legislative acts and contracts. *A fortiori* the benefit of this practical construction by the Government cannot be denied to the Indians. Under that construction it therefore follows that the title to the bed, islands and shores of the Illinois part of Lake Michigan including the lands in question, was left in the Indians by the Greenville treaty.

XIII.

BY RECOGNIZING IN NUMEROUS TREATIES SUBSEQUENT TO THAT OF GREENVILLE, THE INDIAN TITLE TO THE LAKES, RIVERS AND ISLANDS IN THE NORTHWEST TERRITORY, BOTH THE GOVERNMENT AND THE INDIANS HAVE CONSTRUED THE GREENVILLE TREATY AS EMBRACING THE ISLANDS AND SUBMERGED LANDS OF LAKE MICHIGAN.

At the risk of wearying by repetition, we will say again that the language of the Greenville Treaty is too plain for construction; that in view of the language used when the United States "relinquished" to the Indians their claims to that part of the Northwest Territory not ceded to the United States, which the Treaty even called "Indian lands" and to which the Northern Boundary was given as "the boundary line agreed on by the United States

and the King of Great Britain in the Treaty of Peace made between them in the year 1783,"—we emphatically deny that there is anything left for construction; that the signing of the Greenville Treaty left the lakes (including the islands, submerged lands, shore lands, etc.), as well as the uplands, in Indian ownership, left them in that ownership in fee simple; and not only was it title in fee simple by a quit-claim from the Government but it was title by a warranty deed because of the guarantee by the Government (Greenville Treaty, Art. 5, 2 Kappler, 42) that "until such sale, the United States would protect all said Indian Tribes in the quiet enjoyment of their lands, etc."; but if there is anything to construe, later Treaties, which were entered into between the United States and the Indians, with the wording of the Greenville Treaty undoubtedly before the parties, and in contemplation of the minds of the representatives of both parties, show how both parties understood the Greenville cessions with reference to the lakes, their shores and islands.

In that long list of Treaties, throughout, the lakes that were included in the Northwest Territory and in the relinquishment at Greenville, the cessions by the Indians to the United States were by metes and bounds in the lakes and islands as well as in the uplands; every part of lake or island ceded was as particularly specified and described as were any portions of the mainland. (See VIII *ante*.) Is it even conceivable that this would have been done if the understanding by both parties to the Greenville Treaty had not been that the latter left complete

ownership to the lake, shores and islands in the Indians?

In *Shanks* v. *Dupont*, 3 Peters, 242, this court construed the Treaty of Peace of 1783 by the light of the subsequent Treaty with Great Britain in 1794.

In the Article on Treaties of Cession in 28 Am. & Eng. Ency. of Law, page 519 (2nd Ed.), it is said:

> "Tide lands and lands under navigable waters occupy no different position from that of other lands."

These later Treaties furthermore are practically conclusive evidence of how the officers of the Government, including the Treaty making Power, consisting of the President and Senate, had construed the Greenville Treaty in these respects. This court has looked upon that kind of construction as well nigh conclusive where there have been any ambiguities to construe.

Patterson v. *Jenks*, 2 Pet. 216, 230.

And we deny that in this case there is any ambiguity.

XIV.

CIRCUMSTANCES EXISTING AT THE TIME OF MAKING THE TREATY MAY BE CONSIDERED.

It is understandable, that the Government commissioners did not deem it worth while to purchase that part of Lake Michigan which has no islands of any importance. On the other hand, it cannot be assumed that by the Treaty of Greenville the Indians, although retaining all the lands border-

ing on the lakes, had given them up with their shores and islands and thereby renounced their occupation of fishing, which was one of their principal means of subsistence.

The circumstances surrounding the making of a Treaty may be considered as aids in its construction.

> *United States* v. *Winans,* 198 U. S. 371, 381.
> *U. S.* v. *Clarke,* 8 Peters, 436, 462.
> *Strother* v. *Lucas,* 12 Peters, 410, 438.

In the latter case Mr. Justice Baldwin said (page 438):

> "The terms of a treaty are to be applied to the state of things *then* existing in the ceded territory. (8 Peters, 462.)" (Italics ours).

To all these considerations must be added that the acknowledged title to the lakes, islands and shores had, under both the British and American Governments, been recognized as originally in the Indians. (See No. I, *ante.*) Can it be said that by any subtle or obscure construction of language in the Greenville Treaty that title was divested under the circumstances stated?

In *Winters* v. *U. S.,* 207 U. S. 564, 576, Mr. Justice McKenna said:

> "*The Indians had command of the lands and the waters*—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"

And the court then proceeded to construe the treaty in accordance with the contention most favorable to the Indians.

XV.

A CONSTRUCTION PLACED UPON A TREATY PROVISION BY GOVERNMENT OFFICERS WHOSE DUTY IT IS TO CONSTRUE AND APPLY THEM, IS ENTITLED TO GREAT WEIGHT.

We have heretofore referred to the practical construction placed by both parties upon the Treaty of Greenville with respect to the inclusion of lakes, shore lands and islands in their relinquishment by the Government to the Indians in the Greenville Treaty. (See VIII, *ante.*)

In *Patterson* v. *Jenks,* 2 Peters, 216, 229, Chief Justice Marshall said:

> "Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest made with Georgia and the Creeks, might claim a construction favorable to the pretension of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, *it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words.*"

And on page 230:

> "If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, *we should not hesitate to adopt that construction in this case.*"

In *St. Paul, etc. Ry. Co.* v. *Phelps,* 137 U. S. 528, Mr. Justice Lamar said:

> "Had any such cases been presented when the language of the statutes under consideration was dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force *and generally a controlling one* in the formation of the judgment of this court."

Even, therefore, assuming for the sake of the argument, (and only for the sake of the argument), that there is an ambiguity in the Greenville Treaty as to whether or not title to the lakes was left in the Indians, does not the construction put upon that treaty by the treaty making power of the nation in the eight treaties enumerated in No. VIII, *ante,* remove that ambiguity and make that construction *controlling?* And is not force added to that construction by the compilers on behalf of the Government of "Indian Land Cessions" heretofore referred to, under which the cessions in question are run to the shore line only of Lake Michigan; while the lines of cession under the eight treaties above referred to are on the maps shown as running into and across the lakes; and the part of Lake Michigan in question is not shown as included within any of the Indian cessions?

XVI.

BUT EVEN IF THE CONSTRUCTION OR THE POLICY OF DEPARTMENT OFFICERS HAD BEEN OTHERWISE, THE RIGHTS OF THE COMPLAINANTS WOULD NOT HAVE BEEN AFFECTED, FOR A SUPPOSED POLICY OR PRACTICE OF CONGRESS OR OF ANY OF THE GOVERNMENT DEPARTMENTS CANNOT CONTROL OR OVERCOME THE PLAIN PROVISIONS OF A STATUTE, AND HENCE OF A TREATY.

Among the arguments presented to the court below, and which seems to have influenced, more or less, the decision of the court, was that the United States is the trustee or guardian of the Indians; that the United States must have had knowledge or notice that more or less of the lands in question had been seized by some of the defendants and claimed by the state; that the United States has acquiesced in these claims by failing to take proceedings to oust the defendants or prevent further seizures; that, therefore, the United States must have thereby given a practical construction to the question of title in the Indians. It may be said for one thing that there never was an instance of Indians losing title by any such action on the part of the United States. It is doubtful whether a failure to act on the part of the United States at any time amounts to a construction of a title or of a treaty or statute, or of anything else. But when we speak of the United States, after all, we mean some officer or department that is charged with the particular duty. A supposed policy or practice of congress or of any of the government departments cannot control or over-

come plain provisions of a statute, and hence of a treaty.

St. Paul, etc. R. Co. v. *Phelps,* 137 U. S. 528.

Even the affirmative action by the Department of the Interior inserting restrictions in a lease by an Indian allottee which is contrary to a treaty is void and of no effect.

Jones v. *Meehan,* 175 U. S. 1, 32.

Even a direct conveyance made in violation of a treaty will not create an equitable estate in the grantee, although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers,* 16 Kas. 166.
Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.
Best v. *Doe,* 85 U. S. 112.
Heckman v. *United States,* 224 U. S. 413, 446.
Rice v. *Minn., etc. R. R. Co.,* 66 U. S. 147.
Mullen v. *Simmons,* 234 U. S. 192.
Franklin v. *Lynch,* 233 U. S. 269.

Except in cases purely political, Congress has no constitutional power to unsettle rights under a treaty or to effect titles already granted by the treaty itself.

Jones v. *Meehan,* 175 U. S. 1, 32.
Wilson v. *Wall,* 6 Wall. 83, 89.
Reichert v. *Felps,* 6 Wall. 160.
Smith v. *Stephens,* 10 Wall. 321, 327.
Holden v. *Joy,* 17 Wall. 211, 247.
Choate v. *Trapp,* 224 U. S. 665, 677, 678.

Bartlett v. *United States,* 203 Fed. Rep. 410.

Terrett v. *Taylor,* 13 U. S. (9 Cranch.) 43.

XVII.

THE FOREGOING RULE APPLIES TO WATER AS WELL AS TO LAND.

That the rule applies to water as well as to land may be seen by reference to *Winters* v. *United States,* 207 U. S. 564, the language of which has been quoted heretofore under XIV.

XVIII.

TITLE IN THE COMPLAINANTS BEING ESTABLISHED BY VIRTUE OF THE GREENVILLE TREATY, THE BURDEN OF SHOWING THAT THAT TITLE HAS BEEN AT ANY TIME DIVESTED IS ON THE DEFENDANTS.

Section 2126 (1 Kappler, 15) of U. S. Revised Stat. is as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, *the burden of proof shall rest upon the white person,* whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

While the provision relates, apparently, merely to questions of fact, it is yet quite applicable to the matter under consideration.

Having traced the Indian title down to the Greenville Treaty of August 3, 1795, and having shown that the signing of that Treaty left the complete

title both of the Government and the Indians in the latter, we have established title in the complainants by previous possession or ownership under the terms of the Statutes. In our bill of complaint we pleaded the Greenville Treaty as a fact. Have we not thereby established a *prima facie* case and cast the burden of proof upon the defendants? And is it not true that in our bill of complaint we are merely required to make out a *prima facie* case? And if we are correct in this contention does it not follow that the District Court erred in sustaining the defendants' motion to dismiss the bill?

XIX.

EVEN UNDER ORDINARY RULES OF CONSTRUCTION A TREATY SHOULD BE CONSTRUED THE SAME AS A STATUTE, A CONTRACT, OR AN ORDINARY INSTRUMENT IN WRITING.

The defendants contend that the Greenville Treaty did not leave in the Indians a fee simple title; and, in fact, they contend that as to the islands, submerged lands and shore lands, the Indians were left no title at all and that to the extent that title was given them by that Treaty it was one of occupancy or of possession, and they are pleased to construe that occupancy as one of *pedis possessio;* and that whatever the Indians could not hold by physical occupancy, or which they no longer hold by physical occupancy, they have lost—that the title to that has disappeared—vanished. That is their contention, because it would appear to be impossible for them to

defend their title under any other contention. And yet, Art. 4 of the Greenville Treaty (2 Kappler, 41) plainly relinquishes the claims of the United States in the same language whereby the United States acquired any such claim, namely, the Treaty wtih Great Britain of 1783. The Greenville Treaty plainly says that the relinquishment is southward and westward of the Great Lakes, etc., "*according to the boundary lines agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year* 1783. Did the United States acquire from Great Britain merely a right of temporary occupancy—merely the right of *pedis possessio?*

The Greenville Treaty plainly says (Art. 5) that the United States will protect the Indians in the quiet enjoyment of their lands, etc. Whereon does the contention of the defendants rest that the Indian title merely followed the Indian footsteps, never reached Lake Michigan, its shores and islands, and disappeared when the Indians "left the neighborhood"? Whereon does such contention rest? It rests upon what was undoubtedly intended to allay the Indian fear rather than to entrap them, it rests upon the words in Art. 5 "the Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States." Do these words sound as though they were intended in some subtle way to destroy the absolute title otherwise relinquished to the Indians? The purpose of these words is declared to be "to prevent any misunderstanding." Must they

be construed as creating a misunderstanding which otherwise would not exist? And whose misunderstanding was it sought to remove, that of the United States or of the Indians? It is not conceivable that it was the former whose representative could easily rely upon the English by him otherwise used; the intention was obviously to prevent misunderstanding by the Indians. Was it not the purpose of these words to strengthen and not to weaken the grant to the Indians? They had already been given whatever claim the United States had acquired from Great Britain, and later told that their quiet enjoyment of the lands would be protected by the United States *until sale.* Would not an attempted limitation lead to, rather than prevent, a misunderstanding by the Indians? That such a trap had been set by General Anthony Wayne and by the United States Government to enmesh the Indians and betray their faith is hardly conceivable; the undoubted purposes of those words was to convey to the Indians the assurance that their use of the land was not restricted either as to manner or as to time.

As Chief Justice Marshall said in *Worcester* v. *Georgia,* 6 Peters, 515, 553:

> "So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.
>
> "To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an oc-

> casional village, and an occasional corn field, interrupted and gave some variety to the scene.
>
> "These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, etc."

A covenant for quiet enjoyment in a deed between private parties would not have the effect of destroying the fee simple character of a grant. Why should it be seriously entertained that such are the effects of the words in this Treaty? Even omitting all other reasons why those Treaties should be construed in favor of the Indians, they should still be entitled to the construction ordinarily placed upon deeds between private parties.

Quoting from Lord Denman in *Aspdin* v. *Austin*, 5 Q. B. 671, 684, Mr. Justice Brown said in *Tucker* v. *Alexandroff*, 183 U. S. 424, 436:

> "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."

And further, quoting from 1 Kent's Com. 174:

> "Treaties of every kind * * * are to receive a fair and liberal interpretation according to the intention of the contracting parties and to be kept with good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

In *Adams* v. *Akerlund*, 168 Ill. 632, 638, Justice Magruder said:

> "In thus giving a construction to the language of treaties, the courts will adopt the same general rules, which are applicable in the construction of statutes, contracts and written instruments generally, in order to effectuate the purpose and intention of the makers."

In the Amiable Isabella, 6 Wheaton, 1, 72, Justice Story said:

> "This court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice."

A supposed policy of the Government cannot control or overcome the plain provisions of a statute, hence of a treaty.

> *St. Paul, etc. Ry. Co.* v. *Phelps*, 137 U. S. 528.

If it had been intended by the Greenville Treaty to limit the otherwise plain expressions giving to the Indians what amounts to a warranty deed in fee simple, in the language of Chief Justice Marshall in *Worcester* v. *Georgia*, 6 Peters, 515, 554:

> "Had such a result been intended, it would have been openly avowed."

In *New York Indians* v. *U. S.*, 170 U. S. 1, 20, Mr. Justice Brown said, speaking of the *habendum clause:*

> "It may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises. * * *
>
> "In this case if the habendum clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and habendum clauses."

It is submitted that there is not even reasonable room for the contention that the Greenville Treaty limited the title of the Indians to the time and place of actual use and occupation, and that that title was forfeited wherever and whenever that use and occupation ceased. Whether, therefore, tested by the rule of construction of a treaty with Indians, resolving all ambiguities in their favor, whether it be by the rule that everything is reserved by the Indians which is not expressly ceded to the Government, or whether it be under the rule governing treaties and contracts generally, it must be concluded that the words in the Greenville Treaty "hunting, planting and dwelling thereon so long as they please" are merely explanatory of the use to which the lands could be put to by the Indians, or rather as an assurance that the Indians could put the lands to any kind of use they pleased and as long as they pleased, and were not in derogation of the fee simple title as explained to them by General Wayne (see No. II, *supra*); and they would not authorize a forfeiture the moment the Indians did not so use the land or at any spot where they failed to so use it. No such case of forfeiture has ever taken place in the history of the United States. The numerous treaties of cession in

the Northwest Territory, cited in No. VIII, *ante*, are all against any such theory of confiscation or forfeiture. It certainly cannot be held that these words were intended to destroy the effect of the guaranty by the United States that they would protect the Indians in the enjoyment of their lands until sale to the United States.

XX.

EVEN UNDER ORDINARY RULES OF CONSTRUCTION, WHERE LAND ALONG THE SHORE IS CLEARLY AND RIGIDLY FIXED BY DEED OR BY SURVEY, IT WILL NOT BE AFTERWARDS CHANGED EVEN BY ACCRETIONS.

The complainants' bill avers that in and about the year 1819 a survey was made by one John C. Sullivan, surveyor, which said survey purported to fix the so-called Indian boundary lines, the east boundary of which marked the eastern limit of the cession so made under and by virtue of the Greenville treaty of August 3, 1795, and in the cession of the Treaty of August 24, 1816, usually spoken of as the Treaty of St. Louis (Transcript 4). Copy of that survey, properly certified, is attached as an exhibit to the bill (Rec. 35; Transcript 18). A construction of the eastern boundary line of this very survey, or at least of the survey of 1821, which was a more particular survey of part of the same land, was given in *Bates* v. *Illinois Central Railroad Company*, 1 Black, 204, in which it was said:

> "The land had been surveyed in 1821, and on the plat of the government survey the north fraction of section 10 is represented as having the Chicago River on the south and *Lake Michigan on the east.*"

Exception was taken to part of the charge of the trial court, which was as follows (p. 207):

> "'Under this state of facts, the substantial truths of which are not denied, the land of Kinzie, covered by his entry and purchase, would be the tract *within the following boundaries,* as they existed at the time of the entry (there being no question made, but that the government plats, by which sales were made, show that the whole land north of the river and south of the north line of the fraction was sold as one parcel), and are the north line and west line of fractional section 10, according to the public survey, *and the Chicago River and Lake Michigan, as they existed; that is, it would include all the dry, firm land there was at that time between the west line of the section and the lake,* and the north line of the section and the river. *The river, the lake* and the two lines of the fractional section 10 constituted the boundaries. Whether the land in controversy was within these boundaries, is a fact to be found by the jury, depending upon the evidence before them.'"

This charge of the Circuit Court for the Northern District of Illinois was sustained and the judgment affirmed.

In Illinois the law as to running streams is that in the absence of provisions to the contrary the riparian owners take title to the middle or thread of the stream, but that in round bodies or bodies of irregular shape and large extent like the Great Lakes and even smaller lakes, the riparian owner takes only to the water's edge. But even in the face of this rule Illinois courts hold that the adjoining owner holds only to the water's edge even in running streams where that is fixed upon as the boundary in a deed or survey.

In *People* v. *Board of Supervisors*, 125 Ill. 9, this rule came to be applied to incorporated limits of the City of Edwardsville. Mr. Justice Scholfield there said, at pages 123 and 124:

> "The city is incorporated under a special charter, which, in defining its limits, uses this language: 'Beginning at the north-east corner of section No. 11, town 4, range 8, west of the third principal meridian, and running thence west on the section line, to Gordon's branch; thence down the meanderings of said branch, to the margin of Canokia creek; thence *down on the left bank of said creek*, to the line between sections Nos. 3 and 4, in said township,' etc. (Italics are the court's.) It is undoubtedly the established inference of the law, that a conveyance of land bounded on a highway or river, carries the fee to the center of the highway or river, provided the grantor, at the time, owned to the center, and there be no words or specific description to show a contrary intent; and we shall assume, for the present, at least, that this rule is equally as applicable to boundary lines of towns, etc., as to private grants. *But it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or flats below high-water mark, if he does it by clear and specific boundaries.* 3 Kent's Com. (8th Ed.), pp. 534, 535, *434. And so we said in *Rockwell* v. *Baldwin et al.*, 53 Ill. 22: 'It is, however, but a presumption, for *one man may own the bed of such a stream, and another may own the banks;* and where, in a deed conveying land, the boundary is limited to the bank of the stream, instead of bounding it on or along the stream, the presumption must fail. The party must be controlled by the terms of his deed.' There, the language, 'thence down the west line of the creek,' was held, in connection with certain circumstances tending to show the interest of the

> grantor to be to that effect, to establish the boundary line on the bank of the creek. * * * None of the cases cited in argument by counsel for respondents goes to the extent of holding that where a line is described as *running on a particular bank* of the stream, it in fact runs in the *middle* of the stream." (Italics are the court's.)

In *Trustees of Schools* v. *Schroll*, 120 Ill. 509, it was said (p. 518):

> "'It is equally well settled that grants of land bounded on streams or rivers above tide-water carry the exclusive right and title of the grantee to the center of the stream, *usque ad filum aquae*, subject to the easment of the navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. * * * *But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge.*'"

In *Cook* v. *McClure*, 58 N. Y. 437, it was held (from syllabus):

> "In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.' Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the

gradual and imperceptible result of natural [illegible]"

See also Point IX, *ante*.

We recognize that there has been a difference of opinion among some of the courts with reference to smaller lakes, but none at all as to larger lakes. The only substantial conflict there seems to be among the authorities is as to whether high-water mark or low-water mark or ordinary water mark should be considered the boundary where such boundary is not more particularly specified, and also whether natural, imperceptible accretions belong to the riparian owner or the owner of the bed. All these questions are immaterial here for three reasons: firstly, because the then shore line of Lake Michigan was intended to be a rigid boundary, for the language of cession in the St. Louis Treaty, among others, is that the relinquishment is of the land "*contained within the following bounds*"; secondly, the bill of complaint in the case at bar charges that the defendants are holding land artificially made (Tran. 5, Rec. 14; Trans. 10, Rec. 22, etc.); thirdly, Lake Michigan having no appreciable tides, has, strictly speaking, no high or low water mark.

Both the Government and the Indians have repeatedly given practical construction to the Greenville Treaty as including the lakes in the relinquishments by the Indian Nations by the Government taking and paying for practically all the different portions of the Great Lakes, and of the islands in them, on the American side, excepting the part of Lake Michigan in question.

All the cessions by the Indians of Illinois lands were by metes and bounds and ran to the shore line of Lake Michigan only, hence bed of Lake Michigan was not included.

Treaty of St. Louis of Aug. 24, 1816, Art. I, 2 Kappler's Indian Affairs, 132.

Treaty of Prairie-du-Chien of July 29, 1829, Art. I, 2 Kappler's Indian Affairs, 297.

Treaty of Tippecanoe of Oct. 20, 1832, Art. I, 2 Kappler's Indian Affairs, 353.

Treaty of Chicago of Sept. 26-27, 1833, Art. I, 2 Kappler's Indian Affairs, 402.

In *Stone* v. *United States*, 2 Wall. 525, it was said:

"The grant to Delaware Indians in 1829 *calls for Camp Leavenworth as a boundary; consequently, the camp and its appurtenances were not included in the grant."*

XXI.

EVEN UNDER ORDINARY RULES RELATING TO PROPERTY IN THE BED OF LAKES AND RIVERS, RECLAIMED OR MADE LAND FOLLOWS THE TITLE TO THE BED.

See Point IX, *ante*.

XXII.

IN THE CASE OF LARGE BODIES OF IRREGULAR SHAPE LIKE THE GREAT LAKES, THE TITLE TO SUBMERGED LANDS IS SEPARATE AND DISTINCT FROM THE TITLE TO THE SHORE LANDS.

See Point IX, *ante*.

XXIII.

EVEN IN THE CASE OF RUNNING STREAMS OR MARSHES THE CONVEYANCE OF THE SHORE LINE DOES NOT CARRY WITH IT CONVEYANCE OF THE BED OF THE STREAM WHERE THE DEED MAKES THE WATER'S EDGE THE BOUNDARY LINE.

See Point IX, *ante*.

XXIV.

THE RIGHTS OF THE POTTAWATOMIES UNDER THE GREENVILLE TREATY WERE REITERATED AND REASSURED TO THEM BY THE TREATY OF ST. LOUIS OF 1816.

In the Treaty of St. Louis of August 24, 1816, in Article Three (2 Kappler, 133) appears the following:

> "The contracting parties, that peace and friendship may be permanent, promise that in all things whatever, they will act with justice and correctness towards each other, and that *they will, with perfect good faith, fulfill all the obligations imposed upon them by former treaties.*"

This is the Treaty by which the United States acquired from the Indians the tract of land along Lake Michigan which embraces the present site of Chicago. This language excludes any implication that the protection of "quiet enjoyment," etc., guaranteed to the Indians by the Greenville treaty, was no longer in force, and that any statute of limitations had commenced to run against their title to any of their property not ceded.

XXV.

THE SAME ASSURANCE WAS RENEWED TO THEM IN THE TREATY OF POTTAWATOMIE CREEK JUNE 5 AND 17, 1846.

Article Two of this Treaty (2 Kappler, 558) as follows, is the cession and reservation:

> "The said tribes of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of lands ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or in part, possessed by their people, lying and being north of the river Missouri, and embraced in the limits of the Territory of Iowa; and also all that tract of country lying and being on or near the Osage River, and west of the State of Missouri; *it being understood that these cessions are not to affect the title of said Indians to any grants or reservations made to them by former treaties.*"

No Statute of Limitations could have begun to run prior to that.

XXVI.

THE ASSURANCE WAS REPEATED IN SECTION 2079 OF THE REVISED STATUTES, ENACTED MARCH 3, 1871.

Section 2079 is as follows (1 Kappler, 8):

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen*

hundred and seventy-one, shall be hereby invalidated or impaired."

In addition, therefore, to restriction upon alienation, which of itself would prevent any statute of limitations from running, as elsewhere shown, have been these repeated assurances down to 1871 by treaties and statutes that the Greenville Treaty remained in force and that the Indians will be losing no rights granted by it, in violation of its provisions. So thoroughly did the Government take upon itself, even as late as 1871, the protection of the rights assured by the Greenville Treaty that the drastic Section 2013 was enacted to prevent any voluntary litigation by the Indians unless sanctioned by the Government. Section 2013 is in part as follows:

> "No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: * * *
>
> "It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. * * *
>
> "All contracts or agreements made in viola-

tion of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Can it be assumed that the United States intended to prohibit the Indians from engaging counsel of their own accord, to press their claims and then apply to them the rule of laches, or a statute of limitations or estoppel because they failed to do so? A failure to act can amount to laches, etc., only where there is a duty to act.

XXVII.

THE RESTRICTION UPON ALIENATION CONTAINED IN THE GREENVILLE TREATY RELIEVES THE INDIANS FROM THE NECESSITY OR OBLIGATION OF MAKING ANY ASSERTION OR CLAIM OF TITLE IN OR OUT OF COURT, AND THEIR TITLE IS NOT AFFECTED OR IMPAIRED BY ANY STATUTE OF LIMITAIONS, ADVERSE POSSESSION (IF ANY) OR THE RULE OF LACHES.

When the Government has vested all its title to land in fee simple in the Indians, the restriction against alienation is not intended for the benefit of the United States nor to enable it to repossess the lands, but is simply intended to protect the grantee

against his own improvident acts and against land falling into the hands of a foreign nation; also to declare that the title should remain in the grantee notwithstanding any alienation that he might make.

United States v. *Auger*, 153 Fed. 671.
Stephens v. *Smith*, 77 U. S. 321.
Schrimpscher v. *Stockton*, 183 U. S. 290, 299.
Pickering v. *Lomax*, 145 U. S. 310, 316.
United States v. *Noble*, 237 U. S. 74.
Henkel v. *United States*, 237 U. S. 43.

None of the defendants can acquire title by mere acts of seizure or possession no matter how long continued. Even a direct conveyance to them by the Indians would have given them no title and they cannot acquire title indirectly which they could not have acquired by direct conveyance.

A conveyance made in violation of a treaty will not even create an equitable estate in the grantee although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers*, 16 Kas. 166.
Leavenworth, etc. R. Co. v. *United States*, 92 U. S. 733.
Best v. *Doe*, 85 U. S. 112.
Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192.
Franklin v. *Lynch*, 233 U. S. 269.

The Indian title is guaranteed in the Treaty of Greenville by the United States. See *Worcester* v. *Georgia*, 6 Pet. 515, 557.

In *Schrimpscher* v. *Stockton*, 183 U. S. 290, 299, Mr. Justice Brown said:

> "Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In *Sheldon* v. *Donohoe*, 40 Kas. 346, it was said:

> "The land cannot be sold or otherwise disposed of except to the United States or to the members of the united bands of Indians, for whom it was reserved. So far as we are advised, the restriction on the alienation of this land has remained unchanged since its enactment in 1859, and it renders Sheldon incapable of taking title, and the deed from Donohoe to him absolutely void. * * * Sheldon was incapable of taking the title to the land then, and has been ever since that time. By the paramount federal law he was prohibited from taking the title, and therefore *he cannot indirectly build up one by adverse possession, estoppel, or any statute of limitations.* (*Stevens* v. *Smith*, 2 Kas. 243; *Stone* v. *Young*, 4 *id.* 17; *Pennoc* v. *Monroe*, 5 *id.* 578; *Clark* v. *Akers*, 16 *id.* 166; *Maynes* v. *Veale*, 20 *id.* 374; *McGannon* v. *Straightledge*, 32 *id.* 524.) * * * It has been expressly ruled, however, that a conveyance made in violation of a treaty will not even create an equitable estate in the grantee, al-

though he may have paid all the purchase money and have taken actual possession of the land. (*Clark* v. *Akers*, 16 Kas. 166.) The possession which Sheldon formerly held can count for nothing in this action. He not only could not purchase, but he was forbidden by law from going upon the land."

In *Auditor General* v. *Williams*, 94 Mich. 180, it was said:

"* * * and the question now presented is whether the United States by that instrument disposed of all its control and interest in the land to the patentee, or whether the condition against alienation is such a regulation as the state has a right to ignore or interfere with, when the scope and effect of the above mentioned compact is given consideration. If so, there can be no doubt of the right of the state to impose taxes upon it; but if, on the other hand, the restriction against alienation contained in the patent in pursuance of a resolution which the government had authority to make in the exercise of its watchful care for the Indian to whom the conveyance was made, then the land would not be amenable to taxation, for the reason that the state, by the legislation quoted, is bound never to interfere with the primary disposition of the soil within the same by the United States, nor with any regulation necessary for securing the title in such soil to the bona fide purchasers thereof. That the restriction against alienation contained in the patent is reasonable (Here the patent contained the non-alienaton clause in our case shown by the Treaty) and one which the government had a right to reserve when making a primary disposition of the land to the Indian of the class known as 'those not so competent,' we have no doubt; and it may well be inferred that this right was understood by the high contracting parties to the compact relating to the admission

of Michigan into the Union to have been inherent in the United States, and one which states subsequently established within the limits of the Northwest Territory would be bound in honor to maintain, for it is provided in article 3 of the ordinance of 1787 that 'the utmost good faith shall always be observed towards the Indians. Their land and property shall never be taken from them without their consent, and in their property rights and liberty they shall never be invaded or disturbed unless in just and lawful wars, authorized by congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done them.'

"In the case of *Goodell* v. *Jackson*, 20 Johns. 715, Chancellor Kent says that in the early days of the republic the government watched with great anxiety over the property of the Indians intrusted to its care, whether owned by tribes or families or individuals. If it was Indian property in land, it had a right to protection from us against our own people. And the Supreme Court of the United States in *U. S.* v. *Kagama*, 118 U. S. 375, asserted—as they have practically done in many other cases—that the Indians are wards of the nation and under the paternal superintendence of the government. It was in the faithful observance of this duty that the government made a distinction between the Indians, denominating some as 'competent' and others as 'those not so competent' and, in order to protect the latter class from their own folly, inexperience and weakness, as well as to guard them against the schemes of designing men, it placed a restriction against the alienation of the interest of the land conveyed by the patent. * * *

"It is not necessary to determine here the exact extent of the title conveyed by this patent, nor what the rights of those who may inherit it from the patentee may be at some time here-

after, nor whether or not this class of Indians are citizens of the state, with the right to exercise the elective franchise. All these are questions outside of what we deem to be material to an adjudication of the rights of the parties in this case. It is only necessary to say that under this patent from the United States the patentee has a right to the use, occupancy and enjoyment of the land, but has not the right to alienate it, either by direct or indirect means."

In *Choate* v. *Trapp*, 224 U. S. 665, 671, it was said:

"This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Chictaws and Chickasaws were divided in severalty among the members of the tribes. * * * But there is a broad distinction between tribal property and private property, *and between the power to abrogate a statute and the authority to destroy rights acquired under such law.* * * * The individual Indians had no title or enforceable right in the tribal property. But as one of these entitled to occupy the land, he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. * * * It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. * * *

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few *all recognize that he is not excepted from the protection guaranteed by the Constitution.* His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. * * * His private right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject

to the guardianship of the United States *as to his political and personal* status. * * * While Congress had power to make treaties it could not affect titles already granted by the treaty itself. * * * Incompetent persons, though citizens may not have the full right to control their property and there was nothing in citizenship incompatible with guardianship or with restricting sales by Indians deemed by Congress incapable of managing their estates. But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th Amendment.* * * * We have seen that it (exemption from taxation) was a vested property right which could not be abrogated by statute."

Of course, that property right could not be abrogated by any state statute of limitations either.

In *O'Brien* v. *Bugbee*, 46 Kas. 13, the court said:

"Neither can O'Brien nor Updegraff claim any title under the statute of limitations on account of the possession of their grantors, or the parties through whom they claim, because the title or possession of Polly Manture was so restricted and limited that adverse possession could not give title without the consent of the secretary of the interior. * * *"

"Again, the deed from George Buchanan to Joachim Rathjen, who quit-claimed to John C. McCoy, Sr., on the 12th of August, 1881, counts for nothing. It was never approved by the secretary of the interior, and was void; therefore, neither McCoy nor his grantees are estopped by any recitations therein contained. (7 Am. & Eng. Ency. of Law, p. 5, note 2, * * * 3 Washb. Real Prop., p. 106.)"

What is said on this point has relation so far as any statute of limitations, adverse possession (if any) or the doctrine of laches may be invoked against the Indian title as such. It is further our contention that neither could they be invoked upon the bill of complaint here as against the complainants, even if the latter were white men and were compelled to assert their title under ordinary state laws. This contention we will treat separately. (See No. XXXV *post.*)

XXVIII.

UNTIL THE EXTINGUISHMENT OF THE INDIAN TITLE THE LAND IN QUESTION WAS NOT EVEN TAXABLE, NOR WOULD IT BE FOR FIVE YEARS THEREAFTER UNDER THE PROVISIONS OF THE ORDINANCE OF 1787, AND UNDER THE ENABLING ACT FOR ADMITTING ILLINOIS AS A STATE.

Under No. XXVII *ante* we quoted a number of authorities in which it was recognized that the State has no right to tax lands to which the title remains unextinguished. This immunity from taxation has been even extended to individual Indian allotments in which the right of alienation has been by the Government prohibited for periods of from five to twenty-five years.

In the present case, however, this right is further protected by the provisions of the famous Ordinance of 1787. As we are showing elsewhere, the general government has the exclusive right to extinguish the Indian title. The lands in question could not become even part of the public domain until after such extinguishment.

Article Four of the Ordinance of 1787 provides:

> "The legislature of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States."

This was among "the articles of compact between the original states and the people and states in the said territory," to "forever remain unalterable, unless by common consent," as provided by Sec. 14.

Article Three provides:

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent."

Taxing the Indian lands, as we have shown in No. XXVII *ante*, would be one way, and a very effective way, of taking lands and property from the Indians without their consent. This is prohibited by the Ordinance of 1787 as well as by the decisions cited under the preceding number. Many state as well as Federal decisions have fully recognized this want of power in the State to tax Indian lands. Among them may be mentioned:

Wah-Pe-Man-Qua v. *Aldrich*, 28 Fed. 489.
Auditor General v. *Williams*, 94 Mich. 18.
Choate v. *Trapp*, 224 U. S. 665.
New Jersey v. *Wilson*, 7 Cranch. 164.
The Kansas Indians, 5 Wall. 737, 761.
United States v. *Rickert*, 188 U. S. 432.

It is, therefore, not conceivable that any claim can be advanced (if the court could assume such a thing upon a demurrer to the bill), that the Indians have lost title through any statute of limitations operating against them because of any taxing laws. Obviously, if such loss of title by the Indians might be permitted, such loss should be affirmatively pleaded instead of being raised by demurrer, or, as in this case, upon motion to dismiss. The considerations, therefore, advanced under this head exclude any possibility of any statute of limitations operating through non-payment of taxes.

The Enabling Act of April 18, 1818, for the admission of Illinois as a State, provides that "the said State shall provide by an Ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January, 1819, shall remain exempt from any tax laid by order or under any authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale." This provision was accepted by Illinois by Ordinance passed by its Constitutional Convention on August 26, 1818.

1 Jones & Addington, Ill. Stat. Ann. 63.

It is significant that the Ordinance of 1787 (Sec. 8) prohibits the laying out of, even into counties and townships, any part of the land in which the Indian title has not been extinguished.

From *Blue Jacket* v. *Com'rs. of Johnson Co.*, 5 Wall. 737:

"The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an Act of Congress of May 28, 1830, ch. 148 (4 Stat., 411), which assured them the country to which they were translated should be secured and guaranteed to them and their heirs forever.

* * * * * *

"* * * *It is conceded that those who hold in common cannot be taxed.*

* * * * * *

"If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

From *Fellows* v. *Denniston*, 5 Wall. 761:

"The question of taxation of Indian lands, while in their tribal organization, by the state authorities, has been before us this term in several cases from the State of Kansas, and after a very full consideration of the subject the power was denied. *Blue Jacket, et al.* v. *Com. of Johnson Co.; Yellow Beaver, et al.* v. *Com. of Miami Co.; Wan-zop-e-ah* v. *The Same* (*ante*, 667.) We refer to the opinions in these as rendering any further examination of the subject unnecessary.

* * * * * *

"We have already given the answer which we think satisfactory to this ground in support of the judgment below. Until the Indians have sold their lands, *and* removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their original rights, and entitled to the undisturbed enjoyment of them."

This exemption from taxation under state laws was enforced even after the Indians had become citizens. In *Choate* v. *Trapp*, 224 U. S. 665, it was said:

"2. The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satis fied and extinguished. * * *

"* * * Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued."

XXIX.

THE ORDINANCE OF 1787 IS PART OF THE FUNDAMENTAL LAW OF ILLINOIS, OF SUBSTANTIALLY THE SAME AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, AND IS PART OF THE SUPREME LAW OF THE LAND.

Illinois was admitted as a State under the Enabling Act of April 18, 1818, which provided for a constitution to be adopted by the State. This provision is:

"Provided that the same, whenever formed, shall be republican and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the River Ohio."

This ordinance of 1787 has been regarded as substantially of the same authority as the Constitution

of the United States and part of the supreme law of the land.

XXX.

THE PROVISIONS OF THE GREENVILLE TREATY ARE ALSO PART OF THE SUPREME LAW OF THE LAND.

Article VI of the Federal Constitution provides (Second):

> "This Constitution and the laws of the United States shall be made in pursuance thereof; *and all treaties made* or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If a treaty embraces matter contravening the statutes of the State, the State statute should be disregarded and full protection of the treaty should be extended. This applies to treaties with Indians as well as with foreign nations.

Leavenworth, etc. Ry. Co. v. *United States*, 92 U. S. 733.

United States v. 43 *Gallons of Whisky*, 93 U. S. (3 Otto) 188.

Fellows v. *Blacksmith*, 19 How. 366.

Orr v. *Hodgson*, 4 Wheat. 453.

Choate v. *Trapp*, 224 U. S. 665.

It follows, therefore, that the several acts of the Illinois Legislature authorizing the City, the several Park Commissions and others to reclaim or build upon any part of the submerged lands of Lake Michigan are against the guaranties of the Greenville Treaty and are void.

In *Fellows* v. *Blacksmith*, 19 How. 366, 372, the court said:

> "An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, become the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress. (1 Cranch, 103; 6 Pet. 735; 10 How. 443; 2 Pet. 307, 309, 314; 3 Story Const. Law, p. 695.)"

XXXI.

AN INDIAN TREATY IS AT LEAST A CONTRACT, AND PROPERTY RIGHTS THEREBY ACQUIRED ARE ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AS ANY OTHER PROPERTY RIGHTS. ANY STATE STATUTE WHICH IS IN VIOLATION OF THE CONSTITUTIONAL PROVISION OR OF TREATY RIGHTS IS VOID.

If a treaty embraces matter contravening the statutes of the state, the state statute should be disregarded and full protection of the treaty should be extended. This applies to treaties with Indians as well as with foreign nations.

Leavenworth, etc. Ry. Co. v. *United States*, 92 U. S. 733.

United States v. 43 *Gallons of Whisky*, 93 U. S. (3 Otto) 188.

Fellows v. *Blacksmith*, 19 How. 366.

Orr v. *Hodgson*, 4 Wheat. 453.

Choate v. *Trapp*, 244 U. S. 665.

Thus in *Choate* v. *Trapp*, 224 U. S. 665, it was said:

> "7. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *Re Heff*, 197 U. S. 504, 49 L. Ed. 855, 25 Sup. Ct. Rep. 506; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 307, 47 L. Ed. 190, 23 Sup. Ct. Rep. 115; *Jackson ex dem. Smith* v. *Gooddell*, 20 Johns. 188; *Lowry* v. *Weaver* v. *McLean*, 82 Fed. Cas. No. 8,584; *Whirlwind* v. *Vonder Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Ark. 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status. * * * While Congress has power to make treaties, it could not affect titles already granted by the treaty itself.
>
> "Nothing that was said in *Tiger* v. *Western Investment Co.*, 221 U. S. 286; 55 L. Ed. 738; 31 Sup. Ct. Rep. 578, is opposed to the same conclusion here. * * *
>
> "There was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th amendment.*"

While since the case of *Worcester* v. *Georgia*, 6 Pet. 515, the constitutional protection of the rights of Indians has been ordinarily invoked in the cases of individual allotments, yet there can be no difference in the case of tribal ownership. The allotment is considered to be merely the result of a partition

of the original title in common. Thus it was said by Mr. Justice McReynolds in *McDougal* v. *McKay*, 237 U. S. 372, 383, quoting from *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529:

> "'So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act.'"

From *People of the State of New York* v. *Dibble*, 21 How. 366, 371:

> "The Supreme Court and the Court of Appeals of New York have decided, 'that the provisions of this Act respecting intrusions on Indian lands, which authorize the summary removal of persons, other than Indians, who settle or reside upon lands belonging to *or* occupied by any nation or tribe of Indians, are upon their land before their title has been extinguished, *and* they have removed, or have been removed by the act of the government, can acquire no such right of property or possession as is within the protection of the provisions of the Constitution which secure a trial by jury.' They, therefore, affirmed the judgment of the County Judge.
>
> * * * * * *
>
> "The judgment of the Court of Appeals of New York is, therefore, affirmed with costs."

From the *State of New Jersey* v. *Wilson*, 7 Cranch, 164:

> "A legislative act, declaring that certain lands which should be purchased for the Indians, should not thereafter be subject to any tax, *constituted a contract, which could not be rescinded by a subsequent legislative act;* such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.
>
> * * * * * *
>
> "* * * The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. *This contract is certainly impaired by a law which would annul this essential part of it.*"

From *Choate* v. *Trapp*, 224 U. S. 665, 678:

> "But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th amendment.*"

XXXII.

ANY STATUTE OR ORDINANCE DEPRIVING OR TENDING TO DEPRIVE INDIANS OF THEIR PROPERTY IS ALSO VOID UNDER ARTICLE THREE OF THE ORDINANCE OF 1787.

We have heretofore had occasion to call attention to this Article. For convenience it is repeated here:

> "ARTICLE III. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The

utmost good faith shall always be observed towards the Indians; *their lands and property shall never be taken from them without their consent;* and in their property, rights and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

XXXIII.

EVEN GOVERNMENT PATENTS ARE VOID IN VIOLATION OF INDIAN TREATY RIGHTS.

The principle is quite familiar that neither a government nor state patent to land conveys title to a patentee where the title to the land was not in the government or in the state, as the case may be, at the time it was issued.

Stone v. *United States,* 2 Wall. 525.
Best v. *Doe,* 85 U. S. 112.
Rice v. *Minn., etc. Ry. Co.,* 66 U. S. 147.

This rule has been applied in several striking cases involving enormous values and numerous patents. In *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733, so much of the land claimed by the Railroad was declared to be Indian property as to endanger the security of the mortgage holders. The court there said:

> "It is urged that parties have loaned money on the faith that the lands in question were covered by the grant. This is a subject of regret, as is always the case when a title, on the strength of which money has been advanced, fails; but it is to be hoped that the security

> taken upon the other property of the Company will prove to be sufficient to satisfy the claims of the holders of its bonds. But whether this be so or not, it is hardly necessary to say that the title to land is not strengthened by giving a mortgage upon it; nor can the fact that a mortgage has been given throw any light upon the title of the mortgagor."

In *Heckman* v. *United States,* 224 U. S. 413, 415, some 30,000 conveyances, a large proportion of them in the shape of government patents, were cancelled as being in violation of treaty rights of the Indians and in violation of restrictions upon alienation. Many of the parties who were thus ousted must have acquired the property in good faith, and the values of the lands taken out of their hands by the proceedings must have run up into many millions.

In *Northern Pacific Railway Company* v. *United States,* 227 U. S. 355, a bill in equity was filed against the Northern Pacific Railway Company to annul patents to large tracts of land. The patents, dated in 1864, were alleged to have been issued by mistake, as there had been what the court found to be an erroneous survey. The difference between the former survey and the corrected one amounted to 293,837 acres (page 358), and it was a matter of public notoriety that the values involved ran into many millions of dollars. The original survey which was held to be erroneous was made about the year 1860. Notwithstanding the lapse of time, many, if not all, the holders of patents claimed to have acquired them in good faith and for value, and notwithstanding also the enormous money losses thereby occasioned, the court's action in vacating

the patents and restoring the land to the Indians was sustained. The pleas of the statutes of limitations were overruled. The court rested its decision upon the Indians' primary rights of title and also treaty rights and upon the special protection from the government to which the Indians are entitled.

The foregoing cases therefore furnish additional reasons for declaring that the several state statutes involved in this case are invalid as in contravention of the complainants' rights.

XXXIV.

THE POWER TO ENFORCE TREATY PROVISIONS IS PARAMOUNT AND SUPREME, AND RESTS IN THE FEDERAL COURTS UPON EVERY FOOT OF SOIL WITHIN THE BOUNDARIES OF THE UNITED STATES.

One of the contentions advanced by the defendants below was that the bill does not present a case for Federal jurisdiction. Among other grounds however of Federal jurisdiction in this case is that it is invoked to enforce the provisions of the Greenville Treaty.

In *United States* v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 886, Judge Shiras said, at page 893:

> "It cannot be questioned that the power of the United States government over the Indian tribes is paramount and supreme. *U. S.* v. *Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109. If the United States, by a treaty duly made with an Indian tribe, has assumed a given duty or obligation to the Indians, the power exists to properly perform this duty within the boun-

daries of the states, as well as within the territories. The power to enforce its laws, and the treaties made by it, in pursuance of the provisions of the constitution, is paramount and supreme, and rests upon every foot of soil within the national boundaries. *Ex parte Siebold,* 100 U. S. 371; *In re Neagle,* 135 U. S. 1, 10 Sup. Ct. 658; *In re Debs,* 158 U. S. 564, 15 Sup. Ct. 900."

XXXV.

EVEN IT THIS WERE NOT AN INDIAN TITLE, NO MERE CLAIM OF TITLE, NOT ACCOMPANIED BY ACTUAL PHYSICAL, ADVERSE POSSESSION, HELD FOR THE FULL PERIOD OF THE STATUTE OF LIMITATIONS, COULD RIPEN INTO A TITLE. SUCH A TITLE MANIFESTLY CANNOT BE SET UP AS AGAINST SUBMERGED LAND OR RECENTLY RECLAIMED LAND, NOR AGAINST VACANT OU UNOCCUPIED, NOR AGAINST UNTAXED OR UNTAXABLE LAND.

Among the grounds of the defendants for their motion to dismiss the bill, is that "the complainants have lost whatever title or right they may have had in said land, if any, by their long and unexcused delay in protecting their alleged title and right" (Abst. 32; Rec. 35). The bill of complaint alleges, and for the purpose of the motion to dismiss, must be taken as true, that "said seizures have been and are in violation of the said treaties; but very few improvements of great value have been made thereon and most of them within recent years; nearly all such improvements of any substantial value have been made since these complainants have openly, notoriously and publicly asserted their claims or right of property and with full and explicit knowledge or

notice of such rights in these complainants; and that these complainants have done or suffered nothing as to any part of such lands which justly or properly gives the right to any claim to any of these defendants of title to these lands or any part thereof under any statute of limitations, laches or estoppel and these complainants at no time expressly or implicitly abandoned said lands or any part thereof." It is evident that under this allegation of the bill, once the Indian title is recognized, if any of the defendants have as to any part of the property by them occupied a defense against complainants, either under any statute of limitations, laches or estoppel, it becomes an affirmative defense to be pleaded and made the subject of a hearing and decision on the facts by the trial court. A wholesale claim of statute of limitations, laches or estoppel as to lands occupied or unoccupied, improved or unimproved, upland or submerged, whether recently occupied or occupied for any extended period, obviously cannot be allowed. If we assume that any such defenses would lie against an Indian title the occupation of a small piece of upland would not justify a later seizure of land submerged and but recently reclaimed. Many considerations bar any such defense taken by way of a motion to dismiss or demurrer.

The doctrine of constructive possession under color of title cannot be extended to large tracts of land not taken for the ordinary purposes of cultivation and occupation.

Wood on Limitations, 3rd Ed., Sec. 262.

The actual possession or *pedis possessio* is essential upon which to base a title by adverse possession or the statute of limitations (2 C. J. 51).

The constructive possession of land is always in the holder of the best title (2 C. J. 53).

An instructive review of what constitutes adverse possession may be found in *Ward* v. *Cochran,* 150 U. S. 597, where Mr. Justice Shiras said, at page 608:

> "Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title."

A mere claim to land, unaccompanied by actual possession, will not ripen into a title, however long and persistently such claim is asserted, and this principle is not affected by the fact that the claimant has paid taxes on the land. And a statute giving a right of action against a mere claimant of title, unaccompanied by possession, does not change the rule requiring the possession to be actual. (2 C. J. 53.)

> "A residence in the vicinity of the land merely, and a claim to it, although such claim is generally recognized and spoken of in the neighborhood and affirmed by the vicinage, unaccompanied by any of the acts and indicia of ownership, are insufficient to constitute possession." *Wood* v. *McGuire,* 15 Ga. 202.

In *Smith* v. *Lee,* 1 Coldw. (Tenn.), 549, 552, the court said:

> "The inference that, because by the recent statute a mere claim of title, unaccompanied by adverse possession, gives a right of action against such claimant, the Statute of Limitations, therefore attached in his favor, by the mere force of such adverse claim, is utterly destitute of foundation in law."

The depositing of material or refuse on another's land does not ordinarily constitute such actual possession thereof as may ripen into title by adverse possession. (2 C. J. 70.)

> "The doctrine seems to be that when an usurper enters upon land, he acquires possession, inch by inch, of the part which he occupies, and that the mere naked possession, without color of title, is adverse only to the extent of the actual enclosure, which must be definite and notorious. Tyler on Ejectment, 894."
>
> *Bristol* v. *Carroll County,* 95 Ill. 84, 93.

If the bed of a body of water is in private ownership, even the accretions formed upon it belong to the owner of the bed and not to the owner of the uplands. Made land follows the title to the bed. Adverse possession of the shore lands can never give right or title to the submerged lands.

> Farnham on Water and Water Rights, Sec. 837.

Laches cannot be imputed to one who is ignorant of his rights and for that reason only failed to assert them.

> *Middaugh* v. *Fox,* 135 Ill. 344.
>
> *Lasker* v. *McCreary,* 66 Fed. 841.

Ritchie v. *Sayers*, 150 Fed. 520.
Halstead v. *Grinnan*, 152 U. S. 412.
Moore v. *Crawford*, 130 U. S. 122.
Lurton v. *Rodgers*, 139 Ill. 554.
Sutherland v. *Reeve*, 151 Ill. 384.
Berry v. *Lovi*, 107 Ill. 612.

The doctrine of laches will not apply where the party asserting it has gained more than he lost by failure or silence of the other party.

Hinds v. *Surbeck*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592, 603,

or unless circumstances amount to an estoppel.

Galway v. *Met. Elev. R. Co.*, 13 L. R. A. 788, 128 N. Y. 132, aff'g 35 N. Y. S. R. 628.

XXXVI.

ALL STATUTES OF LIMITATIONS ARE BASED UPON THE THEORY OF LACHES AND THE THEORY OF LACHES IN ITS TURN CAN BE INVOKED ONLY UPON A STATE OF FACTS WHERE SOME DETRIMENT OR PREJUDICE HAD REEN SUFFERED; AND WHERE THE COMPLAINANTS HAVE NOT EXPENDED IN IMPROVEMENTS AND TAXES IN THE EXCESS OF THE RENTS OR BENEFITS RECEIVED ON THE LANDS, NEITHER LACHES NOR THE STATUTE OF LIMITATIONS CAN BE INVOKED.

The defense of the State of limitations or laches or adverse possession is sought to be raised in this case upon a mere motion to dismiss, equivalent to a demurrer. We pointed out in the preceding point in our argument that even where such a defense can otherwise be made, it can only apply to a case of adverse *pedis possessio*, actual and not constructive,

open, notorious, etc., where such possession had continued for the requisite length of time. In order to sustain such a defense in this case the court is asked to take judicial notice that all of the land claimed has been so adversely held; which would in itself amount to a violent assumption, and is against the allegations of fact contained in the bill. The court should in equity take judicial notice of the contrary, viz.: to the extent that the lands are still submerged they are not being adversely held. If such lands alone were involved in this suit, a motion to dismiss cannot properly be sustained, for the bill is brought not merely to quiet title, but to restrain and enjoin further seizures (Abst. 10; Rec. 23).

Some of the defendants must have felt that it would be an act of hardihood to make this defense on a motion to dismiss, for not all of them set it up in support of that motion. The Illinois Central Railroad Company does, however, set up this defense (Transcript 37; Rec. 75). It says:

> "Twelfth. * * * It further appears from the said bill that the United States, State of Illinois and the City of Chicago and this defendant have for more than sixty years been exercising acts of possession," etc.

The bill sets up no acts of possession by the United States nor by the State of Illinois; and as to the City of Chicago and the Illinois Central Railroad, there is no averment that will apply to all the lands claimed nor to any given length of time. We will assume, however, that it is a fact that the Illinois Central Railroad has exercised some acts of

ownership as to some of the property since 1852. As to that portion of the property, therefore, if we are to assume that the complainants as Indians are bound by the ordinary rules of laches estoppel and statute of limitations which apply to others, it still remains a question of fact whether the facts and circumstances justify such a defense. At best, the Illinois Central Railroad's claim amounts to a mere right of way and is not a fee.

We have seen that mere laches will not debar a party who is ignorant of the facts or ignorant of his rights (see No. XXXV *ante*), both as to laches and the statute of limitations. We, of course, insist that they do not apply in any event to an inalienable title nor against Indians. But the defense of laches is based upon the theory of estoppel. If the court is disposed to take judicial notice of the facts of occupancy by the Illinois Central Railroad, it should also in fairness take judicial notice of the fact that the Illinois Central Railroad has profited by its possession vastly more than it has lost by it.

> "All statutes of limitations are based on the theory of laches. (*Mettler* v. *Miller*, 129 Ill. 630; *Peabody* v. *Burri*, 255 *id.* 592.) Neither plaintiffs in error nor their ancestor have expended money in improvements and taxes in excess of the rents received on the land here in question. Nothing is shown to indicate that any prejudice has resulted to plaintiffs in error by reason of the non-action of defendant in error."
>
> *Peabody* v. *Burri*, 255 Ill. 592.

See also:

Hinds v. *Surbec*, 260 Ill. 606.

This case was decided in 1912, on a claim of title which first arose in 1854, and from which time continuously the land which was the subject-matter of the litigation was in the actual control or possession of another. The court held that a mere failure during all this time on the part of the complainant to assert title did not debar him where the circumstances were such as to prevent the statute of limitations from running.

XXXVII.

BOTH LACHES AND THE STATUTE OF LIMITATIONS ARE AFFIRMATIVE DEFENSES AND TO BE AVAILED OF MUST ORDINARILY BE PLEADED.

"Where there is no positive limitation of time, the question whether the Court will interfere or not depends upon whether, from the facts of the case, the Court will infer acquiescence, or confirmation, or a release. Such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer; because a defendant has no right to avail himself, by demurrer, of an inference of fact upon matters on which a jury, in a Court of Law, or the Court in Equity, would collect matter of fact to decide their verdict."

1 Daniell's Ch. Pl. & Pr., 561.

Gormley v. *Bunyan*, 138 U. S. 623.

XXXVIII.

EVEN AS AGAINST PERSONS OTHER THAN INDIANS THE CONSTRUCTIVE POSSESSION OF LAND IS ALWAYS IN THE HOLDER OF THE BEST TITLE.

In No. XXXV and XXXVI *ante* we took occasion to point out that the defense of laches and the statute of limitations, if they can be entertained at all on the state of this record, and if available against the Indian complainants, would apply only as to lands actually and not constructively held. As that defense in the present case can only be sustained upon the theory that the court will take judicial notice of acts of possession, it will naturally take notice that a large part of the reclaimed and formerly submerged lands, as well as the former islands, are wholly unimproved, or here and there but slightly improved for park purposes, etc. It would probably not be too much to say that as a matter of fact fully 95 per cent, if not 99 per cent, of even the reclaimed land is of that character. The defendants are, therefore, relying, if at all, upon constructive possession only as to such improved land. By no possible act of reasoning can the defense of laches or the statute of limitations apply in the case of such constructive possession merely, for constructive possession is in the holder of the best title; and the best title in this case is the record title established by the Treaty of Greenville, antedating all other records upon which any of the defendants may rely.

2 Corpus Juris, 53.

Ward v. *Cochran*, 150 U. S. 597, 608.

Bristol v. *Carroll County*, 95 Ill. 84, 93.

XXXIX.

THE DOCTRINE OF CONSTRUCTIVE POSSESSION UNDER COLOR OF TITLE CANNOT BE EXTENDED TO LARGE TRACTS OF LAND NOT TAKEN FOR THE ORDINARY PURPOSES OF CULTIVATION AND OCCUPATION.

Wood on Limitations, 3rd Ed., Sec. 262.

XL.

THE DEPOSITING OF MATERIAL, ETC., IS NOT SUCH POSSESSION.

The acts of possession relied upon mainly as creating a condition from which the court is asked to infer laches or the running of some statute of limitations are naturally in the main the acts of filling in and reclaiming portions of the former bed of the lake. The bill recites that most of these acts had been done recently (Abst. 5; Rec. 14) and, therefore, as to them the defense of laches and statute of limitations would not apply at all events; but if these acts had been ever so remote in the past they are not of a nature which set the statute of limitations running, or on behalf of which the defense of laches could be invoked. It is notorious that the dumping of material is not a pecuniary sacrifice, but is a privilege—something which is ordinarily paid for. Such acts do not constitute the kind of possession which is ordinarily called adverse and which may ripen into a title by limitations.

2 C. J. 70, 71, 72.

XLI.

EVEN AS AGAINST PERSONS OTHER THAN INDIANS, AN ADVERSE POSSESSION OF THE SHORE LANDS CAN NEVER GIVE RIGHT OR TITLE IN THE SUBMERGED LANDS.

By what possible stretch of the imagination can this court be asked to assume—and to assume as a matter of judicial knowledge—that the lands which are still submerged and the seizure of portions of which is threatened, have been held adversely and held for a length of time to ripen into a title? If any such long continued adverse possession can be claimed of any of the shore lands, the claim cannot extend to the submerged lands. Adverse possession of shore lands can never give right or title in lands which are submerged.

Farnham on Water and Water Rights, Sec. 837.

2 Corpus Juris, 71, 72.

XLII.

THE NATURE OF THE INDIAN TITLE WHICH EXISTED PRIOR TO THE GREENVILLE TREATY IS ENTIRELY IMMATERIAL, FOR COURTS CANNOT GO BEHIND A TREATY.

Defendants rely upon the claim that the Indian title is one of occupancy—a *pedis possessio* title; which never attached to the bed of Lake Michigan because it was incapable of occupancy and which the Indians lost by removing from the vicinity. This is one of the theories in fact upon which the court below decide this case. We have shown elsewhere that the whole course of conduct of the Government to-

wards the Indians, including its many treaties, contradicts that theory. (See No. II, VII, VIII, *ante.*) But if this theory were otherwise tenable, it has no place in the present instance for the reason that by the Greenville Treaty the United States relinquished its entire title to the Indians and made the Indian title one in fee simple. (See No. IV *ante.*) The question, therefore, of the nature of the original Indian title becomes immaterial, for the courts cannot go behind the Greenville Treaty.

Fellows v. *Blacksmith,* 19 How. 366.

In *United States* v. *Paine Lumber Company,* 206 U. S. 467, *the Indian title was based upon a treaty,* and Mr. Justice McKenna pointed out that the case of *Johnson* v. *M'Intosh,* 8 Wheat. 574, ordinarily relied on as establishing that the Indian title was that of occupancy, did not apply.

> "Such is not the title," the opinion of the court reads. "We need not, however, exactly define it. It is certainly more than a right of mere occupation. *The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. Libby* v. *Clark,* 118 U. S. 250."

We may quote some remarks by Mr. Justice McLean in *Worcester* v. *Georgia,* 6 Pet. 515, 593:

> "So long as treaties and laws remain in full force, * * * judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional."

XLIII.

EVEN OF SOME OR ALL OF THE POTTAWATOMIE NATION HAVE BECOME CITIZENS THAT WOULD NOT AFFECT THEIR TITLE TO THE PROPERTY. AN INDIAN RETAINS ALL HIS RIGHTS TO TRIBAL PROPERTY NOTWITHSTANDING THAT HE MAY HAVE BECOME A CITIZEN.

The first ground for the motion to dismiss the amended bill, as stated by the defendant, City of Chicago (Abst. 33; Rec. 68), is "that proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against this defendant, are not stated." And the second ground is apparently an enlargement of the first ground. The point evidently sought to be made is that the bill is brought by individuals and not by the tribe or nation itself. The bill avers that it is brought by certain individuals for officers and members of the business committee of one of the constituent bands of the Pottawatomie Nation, and that they bring it on behalf of themselves and of the entire band and nation. This has been held to be the proper method of bringing forward the claim of an Indian tribe or nation.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294.
United States v. *Old Settlers*, 148 U. S. 427.
United States v. *Cherokee Nation*, 202 U. S. 101.

In *Heckman* v. *United States*, 224 U. S. 413, 436, Mr. Justice Hughes said:

> "That the conferring of citizenship was in no wise inconsistent with the retention of control

over the disposition of the allotted lands was expressly declared in the case of *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; 55 L. Ed. 738; 31 Sup. Ct. Rep. 578, in which the conclusions of the court were thus stated:

"'Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. * * * Upon the matters involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.'"

In *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, *supra*, Mr. Justice White recites in the statement of facts (p. 560):

"On June 6, 1901, a bill was filed on the equity side of the Supreme Court of the District of Columbia, wherein Lone Wolf (one of the appellants herein) was named as complain-

> ant, suing for himself as well as for all other members of the confederated tribes of the Kiowa, Comanche, and Apache Indians, residing in the territory of Oklahoma. The present appellees (the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office) were made respondents to the bill. Subsequently, by an amendment to the bill members of the Kiowa, Comanche, and Apache tribes were joined with Lone Wolf as parties complainant."

And the right to bring the action in that manner does not even seem to have been challenged.

In *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, Mr. Justice White maks the following a part of his statement of facts (page 295):

> "This cause was begun on the equity side of the Supreme Court of the District of Columbia. The complainants named in the bill were the Cherokee Nation, and its principal chief and treasurer and sundry other citizens of the nation, suing on behalf of themselves and of citizens of the nation residing in the Indian territory. Ethan A. Hitchcock, as Secretary of the Interior, was made sole defendant. It was claimed in the bill that, by virtue of certain treaties and a patent based thereon, the Cherokee Nation was vested with a fee-simple title to its tribal lands in the Indian territory, and it was also averred that, by a treaty executed in 1835, there was secured to the nation the right, by its national council, to make and carry into effect all such laws as the Cherokees might deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as had connected themselves with them."

In the opinion of the court, Mr. Justice White says (page 300):

> "Preliminary to considering the fundamental question raised by the demurrer, it is necessary to notice two subjects not expressly referred to in the opinion below. They are, first, the objection to the formal sufficiency of certain of the averments in the bill; and, second, the claim that the Cherokee Oil & Gas Company was an indispensable party defendant. With respect to the first-mentioned ground of objection, without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked."

In *United States* v. *Old Settlers,* 148 U. S. 427, the following is in the statement by Mr. Chief Justice Fuller (page 427):

> "The original petition was filed March 8, 1889, and the substituted petition, January 23, 1890, and thereby the petitioners, Bryan, Wilson and Hendricks, purporting to act for themselves, and as the commissioners of the 'Old Settlers,' or 'Western Cherokee' Indians, represented that the latter are that part of the Cherokee race of Indians which formerly composed the Western Cherokee Nation, and which subsequently became known as the 'Old Settlers,' and that for the purpose of prosecuting their claims against the United States government they had appointed Bryan, Wilson and Hendricks as their commissioners to represent and in their names and for their benefit to do and perform any and all acts and things necessary and proper to be done by them in the premises."

And in the opinion of the court (481):

> "We approve of this disposition of the matter as just and appropriate under the circumstances, and a competent exercise of judicial

power. The court decides and pronounces the decree to be carried into effect as between the persons and parties who have brought the case before it for decision, and none the less so, because it leaves the mere matter of distribution to be conducted in the manner and through the agencies pointed out in the treaty."

And in *United States* v. *Cherokee Nation,* 202 U. S., 101, 127, the following is quoted with approval by Mr. Chief Justice Fuller:

> "While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty."

In *Pam-To-Pee* v. *United States,* 148 U. S. 691, the following was cited by Mr. Justice Shiras (page 699):

> "In pursuance of the provisions of this statute, on the 14th of April, 1890, a petition was filed in the Court of Claims by the Pottawatomie Indians, by their agent and attorney, John Critcher, and on the 5th of November, 1890, another petition by the Pottawatomie Indians, by their agent and attorney, John B. Shipman. The United States objected to the filing of two petitions, and the court below, overruling a motion to dismiss the latter petition, consolidated the causes, and dealt with them as one. The two classes of claimants unite in the appeal to this court."

Page 704:

"In each case it appears that by special appointment the attorneys represent some of the Pottawatomies who remained in the states of Indiana and Michigan, under the supplementary article of the treaty of September 27, 1833. In this view of the statute the court allows the motion of the defendants to consolidate the cases made on the 8th day of January, 1891, and overrules the motion to dismiss cause No. 16,842, made on the 19th day of January, 1891. This brings the issue by both the petitioners to the consideration of the court, to be disposed of upon one broad ground of the right of all the Pottawatomies of Michigan and Indiana. Congress have recognized by the very title of the Act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, *leaving the question of distribution to that department of the government,* which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

Page 705: ,

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund."

In *Smith* v. *Swormstedt,* 16 How. 288, 302, the following is in the opinion of the court:

"An objection was taken, on the argument to the bill for want of proper parties to maintain the suit. We think the objection not well founded. The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all,

> some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." Citing authorities.

The foregoing are only a few of the many cases in which this right by a few representatives to bring an action on behalf of a numerous class, and particularly in cases of actions on behalf of Indian tribes or nations, is fully recognized.

An argument was presented in the court below also that the complainants herein are not entitled to bring the action because, as stated in *Pam-To-Pee* v. *United States, supra* (page 705), "these petitioners no longer have any tribal organization." The petitioners to whom the opinion of the court refers in case No. 1125 are not the Pokagun band. This can be more clearly seen upon reference to the two cases of *Pam-To-Pee* v. *United States,* 187 U. S. 371, by which the petitioners referred to as not under tribal organization had unsuccessfully sought to share in the fund which was distributed under the decision of the first *Pam-To-Pee* case.

If they did not have tribal organization, however, the merits of the case would not be affected, for the bill is brought on behalf of the entire Pottawatomie nation, including those who are citizens and not members of any tribal organization, as well as on behalf of those who are. But citizenship would not debar them from asserting their rights to tribal property. Section 2119 R. S. (1 Kappler, 35) provides:

> "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life (and every Indian in Indian Territory), is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States *without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.*"

The defendants also contend that this suit is not properly brought in equity, because it is a bill to quiet title, and the complainants are not in possession of at least a portion of the lands. This court, however, said in *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 531:

> "But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the *Taylor* case, we think it can here have no application, since we are of the opinion that the assumption that the cause of action alleged in the bill under consideration is the equivalent of a suit in ejectment is wholly without foundation. We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after deter-

mining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval.

"It is said, however, if the bill be thus construed, the suit is in substance one to quiet title, and, under the well-settled rule, such a suit can be brought only by one in possession. *Whitehead* v. *Shattuck*, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. Rep. 276; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 47 L. Ed. 626, 23 Sup. Ct. Rep. 434. But this contention overlooks the reason upon which the rule is based, as pointed out in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application, and that the court had equitable jurisdiction to determine all the issues presented by the bill."

Equity Rules, Nos. 23 and 38 are additional reasons for bringing this suit in equity. These are as follows:

23. "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court."

38. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court one or more may sue or defend for the whole."

It is evident, therefore, that the objections of the defendants for want of proper parties and because of an alleged remedy at law, are not well taken.

XLIV.

SO LONG AS TREATIES AND LAWS REMAIN IN FULL FORCE THE JUDICIAL POWER CAN EXERCISE NO DISCRETION IN REFUSING TO GIVE EFFECT TO THOSE LAWS WHEN QUESTIONS ARISE UNDER THEM, UNLESS THEY SHALL BE DEEMED UNCONSTITUTIONAL.

There is no pretense, of course, that the Greenville Treaty has ever been repealed or annulled. There is no pretense that the United States had not the power to enter into that treaty with the Indians. It remains in full force. The treaty was not abrogated by any of the subsequent treaties with the Indians, but on the contrary, confirmed. It was not abrogated when Illinois was admitted into the union as a state and when even most of its upland bordering on Lake Michigan was still the property of the Indians. No part of Lake Michigan had then been ceded to the United States, nor since then, and Illinois has at no time acquired title to its bed or islands. Never having had such title, it could give none to any of the defendants by any of the several statutes referred to in the bill of complaint. The complainants have as much right now to come into court and ask the protection from unlawful seizures guaranteed them under the Greenville Treaty as their ancestors had the day after that treaty was signed. "The Laws and Treaties," says Justice McLean in his concurring opinion in the

case of *Worcester* v. *Georgia,* 6 Pet. 505, 594, "which imposed duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the Federal government."

See also:

Fellows v. *Blacksmith,* 19 How. 366.

By no process of reasoning can it be claimed that the Greenville Treaty is no longer in force and that any authority resides in the courts to disregard it. This is all the more so in the case not merely of personal or political rights, but of vested property rights under a treaty which had conveyed title like a government patent, and which title has at no time been parted with, lost or impaired.

XLV.

ANY AND ALL ACTS OF THE DEFENDANTS IN SEIZING ANY OF THE LANDS IN QUESTION, OR EVEN MAKING VALUABLE OR LASTING IMPROVEMENTS THEREON, CANNOT AFFECT THE TITLE OF THE COMPLAINANTS, FOR THE DEFENDANTS WERE BOUND TO TAKE NOTICE OF THE GREENVILLE TREATY AND OF ITS PROVISIONS.

To the extent that the defendants are relying upon length of possession as to any of the lands they are not in a position to invoke either laches, estoppel or any statute of limitations. The bill avers notice to defendants of complainants' rights (Trans. 5; Rec. 14). But it was not necessary at any time to give

them notice of the Indian claim of title, but they must be conclusively presumed to have had notice of it all the time. The Greenville Treaty and all its provisions were notice to all the world of the Indian claim.

We have heretofore had occasion to refer to the case of *Heckman* v. *United States*, 224 U. S. 413, in which many thousands of patents were annulled by a suit in equity as being in violation of restriction against alienation imposed upon the Indians and as being in violation of treaty rights. What makes that case more striking is that the Indians to whom the property was restored had received consideration for their conveyances, but this court, speaking by Mr. Justice Hughes, said (page 446):

> "It is said that the allottees have received the consideration, and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. *The restrictions were set forth in public laws, and were matters of general knowledge.* Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal & Coking Co.*, 137 U. S. 160, 170, 171; 34 L. Ed. 640, 644; 11 Sup. Ct. Rep. 57."

In *United States* v. *Carpenter*, 111 U. S. 347, Mr. Justice Field, speaking for the court, said:

> "It matters not whether the land had been surveyed or not, *the Treaty was notice* that a part of the quarry would be retained by the government and that the whole might be for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

XLVI.

THE FACT THAT PEOPLE INVESTED OR LOANED MONEY ON LAND, THE TITLE OF WHICH IS IN THE INDIANS, DOES NOT GIVE SUCH PARTIES ANY CLAIM TO SUCH LANDS NOR STRENGTHEN THE TITLE ADVERSELY TO THE INDIANS.

See:

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Also:

No. XXXIII *ante* and No. XLVII *post*.

XLVII.

NONE OF THE DEFENDANTS CAN ACQUIRE TITLE BY MERE ACTS OF SEIZURE OR POSSESSION NO MATTER HOW LONG CONTINUED. EVEN A DIRECT CONVEYANCE TO THEM BY THE INDIANS WOULD HAVE GIVEN THEM NO TITLE AND THEY CANNOT ACQUIRE TITLE INDIRECTLY WHICH THEY COULD NOT HAVE ACQUIRED BY DIRECT CONVEYNANCE.

A CONVEYANCE MADE IN VIOLATION OF A TREATY WILL NOT EVEN CREATE AN EQUITABLE ASSET IN THE GRANTEE, ALTHOUGH HE MAY HAVE PAID ALL THE PURCHASE MONEY AND HAVE TAKEN ACTUAL POSSESSION OF THE LAND.

The argument persistently made on behalf of the defendants in the court below was that the Indians had lost their title owing to their failure to assert it for many years. We have heretofore pointed out reasons why neither laches, statute of limitations nor estoppel can be invoked against the complainants as Indians nor even if the complainants were competent. But, after all, when any one loses title to land because of laches or statute of limitations or by estoppel, it is a species of conveyance by sufferance or inaction. It will be readily granted that if the Indians could not part with their title by affirmative action, i. e., by a conveyance, it must follow that they cannot part with it by sufferance.

But the complainants are Indians, they are the wards of the Nation, and whether some of them have or have not become citizens, the wardship continues as long as the restriction upon alienation remains.

The Greenville Treaty provides that in the event of sale the lands shall be sold only to the United States. In such a state of facts there is no way by which the Indians voluntarily or involuntarily can part with the title unless by the affirmative action of both the Government and the Indians or at least by the former as trustee. Against apparently very strong opposition this principle was affirmed in many cases. Thus we have seen in *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733; in *Heckman* v. *United States,* 224 U. S. 413, 446, and in *Northern Pacific Railway Co.* v. *United States,* 227 U. S. 355, immense tracts of land involving enormous values and invalidating tens of thousands of titles (some of them of considerable antiquity) were restored to the Indians. We will quote from *Mullen* v. *Simmons,* 234 U. S. 192, at page 198:

> "This court said, in *Starr* v. *Long Jim,* 227 U. S. 613, 625; 57 L. Ed. 670, 675; 33 Sup. Ct. Rep. 358, that the title to lands allotted to Indians was 'retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence.' It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation 'was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel,' after he had received a patent for the land.
>
> "The principle was applied again in *Franklin* v. *Lynch,* 233 U. S. 269, *ante,* 954; 34 Sup. Ct. Rep. 505, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true, in these cases the act of the Indian was voluntary or contractual, and, it is contended, a different effect can be ascribed to the wrongs done by an

Indian, and that in reparation or retribution of them the state law may subject his inalienable lands—inalienable by the national law—to alienation. The consequence of the contention repels its acceptance."

What has been said under other headings need not be here repeated, but we will content ourselves with a reference to the following cases:

Clark v. *Akers,* 16 Kas. 166.
Leavenworth, etc. R. Co. v. *United States,* 92 U. S. 733.
Best v. *Doe,* 85 U. S. 112.
Heckman v. *United States,* 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.,* 66 U. S. 147.
Mullen v. *Simmons,* 234 U. S. 192.
Franklin v. *Lynch,* 233 U. S. 269.

XLVIII.

IF THE UNITED STATES IS TO BE CONSIDERED AS TRUSTEE FOR THE INDIANS IN THEIR TITLE TO THE LAND, THEN THE RULE APPLIES THAT AN AGENT OR REPRESENTATIVE OR OFFICIAL OF A GOVERNMENT CANNOT DEPRIVE IT OF PROPERTY BY TAKING ITS LANDS AND HAVING STREETS AND HIGHWAYS THEREON, OR IN OTHER RESPECT BIND THE GOVERNMENT AS TO SUCH LANDS.

The court below took the view that the United States government has acquiesced in the occupation of some of the lands in question by the defendants and others, and as guardian or trustee for the

Indians must be considered to have waived the Indian title. Such view is not sustained we believe by any reported case, and we doubt whether the defendants can cite any such case. But there is no dearth of authorities the other way. That neither any officer of the government nor even Congress can deprive the Indians of vested rights in property any more than they can deprive others, is too well established to require extended comment. An officer or agent of the government cannot bind even the government beyond the plain scope of authority given him by law. We refer to the following cases among many:

Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.
United States v. *Chicago,* 48 U. S. 185.
I. C. R. R. Co. v. *Illinois,* 146 U. S. 387.
United States v. *Morrison,* 203 Fed. 364.
Stone v. *United States,* 2 Wall. 525.
United States v. *Carpenter,* 111 U. S. 347.

XLIX.

THE SOLE EXCEPTION TO THE ABSOLUTE RIGHT OF SOIL IN THE INDIANS, EVEN INDEPENDENTLY OF THE TREATY OF GREENVILLE, WAS THAT IMPOSED BY IRRESISTIBLE POWER WHICH EXCLUDED THEM FROM INTERCOURSE WITH ANY OTHER EUROPEAN POTENTATE, AND IMPOSED RESTRICTIONS UPON ALIENATION OF THEIR LAND ACCORDINGLY.

To understand better the absolute nature of the Indian right of soil, even independently of the Greenville Treaty, notwithstanding the terms "per-

petual right of occupancy, of possession, etc.," which the defendants are apparently misconstruing, it is helpful to revert to the view of Chief Justice Marshall in *Worcester* v. *Georgia,* 515, 559, in which he said:

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, *with the single exception* of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians."

The political rights of the Indians as semi-independent communities, have by this time almost entirely disappeared, but their right of property remains. As shown elsewhere in this brief, the Government or Congress can change the political status or the personal rights of the Indians, but it is powerless even by affirmative legislation to deprive them of property rights vested by Treaty. The right of property acquired under the Greenville Treaty is still protected by that treaty and by the Constitution.

L.

"IN THE RECORD OF JUDICIAL DETERMINATIONS OF THIS COURT THERE ARE FEW DECISIONS OF GREATER IMPORTANCE THAN THOSE WHICH WERE PRONOUNCED IN CHEROKEE NATION V. GEORGIA, 5 PET. 1; WORCESTER V. GEORGIA, 6 PET. 515."

The case of *Worcester* v. *Georgia, supra*, is of itself ample authority to sustain the complainants' bill. The defendants seemed to recognize this, and in the court below the authority of that case was sought to be minimized by attacks made on Chief Justice Marshall's public and private life. Yet many years later in *United States* v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188, Mr. Justice Davis said:

> "In the record of the judicial determinations of this court there are few decisions of greater interest and importance than those which were pronounced in *Cherokee Nat.* v. *Ga.*, 5 Pet. 1, and *Worcester* v. *Ga.*, 6 Pet. 515. Chief Justice Marshall, in these cases, with a force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived."

LI.

THE VALIDITY OF A LEGISLATIVE ACT INCLUDING TREATIES, DEPENDS IN NO DEGREE ON ITS CONTAINING THE TECHNICAL TERMS USED IN A CONVEYANCE.

If we are right in our contention that the Greenville Treaty passed to the Indians the entire title

of the government to the lands in question, then it was for all intents and purposes a warranty deed conveying a title in fee simple. The fact that the language of the conveyance in the treaty was couched in terms that were intelligible to the Indians did not detract from the fee simple character of the conveyance. The complainants have just as much right to ask for the protection of the courts to protect that title, at least as though a warranty deed in fee simple had passed to their ancestors and that title had remained undisturbed up to the present time. They are as much entitled to that protection as would be the owners of any estate the title to which had remained undisturbed in the same family for several generations,—say since 1795. In *Rutherford* v. *Greene's Heirs,* 2 Wheat. 196, 198, Chief Justice Marshall said:

> "It has been said that to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read, 'shall be allotted for, and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

This language was quoted and reaffirmed by Mr. Justice Brown on behalf of this court in the case of the *New York Indians* v. *United States,* 170 U. S. 1, 16. The effect of the clause of relinquishment by

the United States to the Indians contained in the Greenville Treaty was to vest in the Indians a fee simple title to the same extent as though a technical warranty deed had been given them, qualified only in respect to the right of alienation.

LII.

THE HABENDUM CLAUSE OF A GRANT IN A TREATY AS WELL AS A DEED MAY EXPLAIN, ENLARGE OR QUALIFY, BUT CANNOT CONTRADICT OF DEFEAT THE ESTATE GRANTED BY THE PREMISES.

The granting clause of the Greenville Treaty is as follows (2 Kappler, 41):

> "The United States relinquish their claims to all other Indian lands northward of the River Ohio, eastward of the Mississippi and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783."

The *habendum* clause is as follows (2 Kappler, 42):

> "The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them shall be disposed to sell their lands, or any part of them, *they are to be sold only to the United States; and until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same."

It is this language which the defendants contend made for the Indians a title merely of a *pedis possessio* occupancy, not extending to parts of lands actually occupied, and disappearing with even a temporary cessation of that occupancy. The judge in the court below took the view that he "could not compel" the Indians to occupy these lands and hence refused to give them any relief to repossess them of their lands. Anent this state of facts, the following from the opinion of Mr. Justice Brown in *New York Indians* v. *United States,* 170 U. S. 1, 20, is illuminating:

> "While the granting clause is in the future tense, an agreement to set apart, the *habendum* clause is in the present tense: 'To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An Act to Provide for an Exchange of Lands with the Indians Residing in any of the States or Territories, and for their Removal West of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations, or bands in severalty, with the right to sell and convey to and from each other.' The object of the *habendum* clause is said to be 'to set down again the name of the grantee, the estate that is to be made and limited, or that the time the grantee shall have in the thing granted or demised, and to what use.' Sheppard's Touchstone, 75. It may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises, and where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying, or controlling it. Jones, Real Prop., Sec. 563; Devlin, Deeds, Sec. 215.

"In this case, if the *habendum* clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and *habendum* clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the *habendum* clause removes that doubt, and imports a present surrender of a defined tract." See also *Worcester* v. *Georgia*, 6 Peters, 515, 553.

LIII.

TITLE TO THE LANDS IN QUESTION BY THE DEFENDANTS, OR ANY OF THEM, DIRECTLY OR INDIRECTLY, COULD ONLY HAVE BEEN ACQUIRED EITHER FROM THE UNITED STATES OR FROM THE STATE OF ILLINOIS. IF THE UNITED STATES EVER HAD TITLE PRIOR TO THE ADMISSION OF ILLINOIS AS A STATE, THEN THAT TITLE PASSED TO THE STATE UPON ITS ADMISSION. THE ONLY CESSION WHICH HAD AT THAT TIME BEEN MADE BY THE INDIANS WAS THE ONE BY THE TREATY OF ST. LOUIS IN 1816, WHICH, BY ITS LANGUAGE AND THE SURVEY MADE UNDER IT (REPRODUCED IN THE RECORD AS PAGE 35 AND SHOWN BETWEEN PAGES 18 AND 19 OF THE ABSTRACT) RAN TO THE SHORE OF LAKE MICHIGAN ONLY. AS THE STATE UPON ITS ADMISSION TOOK ONLY THE TITLE OF THE UNITED STATES AND HAS ACQUIRED NONE SINCE THEN, IT FOLLOWS THAT THE STATE COULD GIVE NO TITLE TO ANY OF THE DEFENDANTS.

In *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, this court held that the land in question was the property of the State of Illinois in trust for public uses for which they are adapted. This was upon the theory that when Illinois was admitted as

a state into the union it was so admitted on terms of equality with all other states, and hence with the title to the submerged lands in the lakes. That case, however, was decided without any reference to the Indian title and the Indians were not parties to the case. But this court is equally committed to the doctrine that when the United States has not the title to lands submerged under navigable waters at the time a state is admitted, the state takes no title upon its admission. "The well settled doctrine," said this court in *Knight* v. *United States Land Association*, 142 U. S. 161 (at page 185), "that upon the acquisition of the territory from Mexico the United States acquired the title to lands under tide water in trust, does not apply to lands that had been previously granted to other parties by the former government, subjected to trusts which would require their disposition in some other way," citing *San Francisco* v. *LeRoy*, 138 U. S. 656. This was repeated in *Shively* v. *Bowlby*, 152 U. S. 1; in *United States* v. *Winans*, 198 U. S. 371, 382, and in other cases.

In the last named case it was said:

> "It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired by its admission into the Union 'upon an equal footing with the original states,' the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could

neither grant nor retain rights in the shore or to the lands under water.

"The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 162 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"'Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

* * * * * *

"'By the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition. *American Ins. Co.* v. 356 *Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 243, 255; *Benner* v. *Porter*, 9 How. 235, 242, 13 L. ed. 119, 122; *Cross* v. *Harrison*, 16 How. 164, 193, 14 L. ed. 889, 901; *First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 133, 35 L. ed. 1046, 1047; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 47, 57, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 1, 42, 43, 34 L. Ed. 478, 490, 491, 10 Sup. Ct. Rep. 792; *McAllister* v. *United States*, 141 U. S. 174, 181; 35 L. Ed. 693, 695, 11 Sup. Ct. Rep. 949."

"Many cases were cited. And it was further said:

"'We cannot doubt, therefore, that Congress has the power to make grants of land below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.'

"The extinguishment of the Indian title opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory."

Let us look at the situation as it existed when Illinois was admitted as a state in 1818. For twenty-three years the Indians had been the owners in fee simple of all the lands bordering upon Lake Michigan of substantially all the islands in it, and of all the submerged lands of the lake, with one exception. That exception was the cession of six miles square included in the present site of Chicago, by the treaty of Greenville, and the same with other lands, by the treaty of St. Louis two years previously. That treaty had ceded upland only, "to a point on Lake Michigan ten miles northward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of said Chicago Creek; thence in a direct line to a point of the Kankakee, etc."

At that time not a foot of the submerged lands of the lake, or of any island therein, had been acquired by the United States government from the Indians, and the United States had no title to any of it. The title was then in the Indians, had been even when the United States in 1783 had succeeded to the rights of Great Britain, and it was confirmed and strengthened by the Greenville Treaty of 1795. Upon the authority of the foregoing cases Illinois took no title to any of the lands then under the waters of the lake, nor to any island therein, upon its admission. When and how did Illinois acquire any such title to convey or grant, as it has attempted to do in the numerous acts of its legislature attacked in our bill? We challenge an answer to this question.

LIV.

THERE CAN BE NO CLAIM OF TITLE UPON THE THEORY OF ABANDONMENT. AFFIRMATIVE ACTION IS REQUIRED ON THE PART OF THE INDIANS AND ALSO A LEGISLATIVE OR JUDICIAL PROCEEDING IN THE NATURE OF AN INQUEST OF OFFICE TO CONSTITUTE AN ABANDONMENT OF TITLE. MERE FAILURE TO ASSERT TITLE IS NOT SUFFICIENT.

We now come to the main theory of the defense, the one upon which the court below mainly based its decision. That theory is that the complainants had "abandoned" the lands in question by removing from the vicinity in or shortly after the year 1833. The theory of title acquired by abandonment has received some attention at the hands of the courts in the case of personal property as between persons

sui juris. It would serve no useful purpose to collate or analyze the general authorities upon this subject, for it has received attention at the hands of this court specifically in the case of Indians. *Mitchel* v. *United States*, 9 Pet. 711, was a case which arose in Florida, and one of the questions was whether the Seminole Indians had abandoned title to certain of their lands. Firstly, let it be noted that the abandonment there claimed to have taken place was before the time Florida had been ceded by Spain to the United States. This court held that the effect of abandonment was to be determined by the rules of law, not of the United States, but of those of the government under whose laws the acts arose. The court there said (page 749):

> "It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority."

In that case the Indian title did not rest upon any such footing as a treaty like that of Greenville, nor even upon the ordinary title held by Indians under British domination; yet the court looked upon that title as one of perpetual right of occupancy or possession. Under Spanish dominion, to which Florida had been subject previous to its acquisition by the United States, the theory did not obtain (as it has under the United States, and probably also had under Great Britain), that originally the Indians were the owners of *all* the lands (Indian Land Cessions, page 535). Under the Spanish regime "No claim by the natives to unoccupied lands or unoccupied territory appears to have been recognized. Such territory was designated as 'waste lands' and formed part of the Royal Domain" (Indian Land Cessions, p. 539). Yet, even under the Spanish government no title could be based on any alleged abandonment by the Indians unless, or until, a legal proceeding or an inquisition and a judgment or decree in the nature of "office found" had been reached. Such a proceeding had been had in another case arising in Florida, viz., *Arredondo* v. *United States,* 13 Pet. 133, 135.

Bearing that in mind, we may now proceed to quote from the *Mitchel* case at page 742:

> "The counsel of the United States pressed in argument the decision of this court in the case of *Arrendondo,* as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case the lands granted had been in the possession and occupation of the Alluchua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and

before any grant was made by the intendant, a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain.

"Considering this to be a judicial act in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata,* we did not feel at liberty to look behind it for evidence on which it was founded; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretense of a similar proceeding having been had in relation to these lands, nor could there well be in opposition to the evidence in the record, especially the report of the assessor-general in 1817, that they were the lands of the Seminoles at the time of the cession by them and the confirmation by Governor Folch. By the common law the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office found so as to annex it to his domain (citing authorities). * * * Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of *Arredondo,* and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbor of Pensacola to be an existing one in 1816. Nor is there any evidence in the record that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the na-

ture of an office by the common law, had taken place under the proper authority. (White, 25, 40, 37.)

"The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims without the previous action of some tribunal, special or judicial."

Such a legal proceeding as that of "office found" must be instituted even where a cause arises for determining a grant which had been given with a condition subsequent; the grant does not *ipso facto* lapse. Thus in *New York Indians* v. *United States*, 170 U. S. 1, 24:

"In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the government might declare a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands, and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may re-enter in the case of the breach of a condition subsequent, and the government, which can only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States* v. *Repentigny*, 72 U. S., 5 Wall. 211, 267 (18: 627, 646), in which the court said: 'We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subjected to the legisla-

lative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings.' Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg* v. *Harriman,* 88 U. S., 21 Wall. 44, 63 (22: 551, 555); in *Farnsworth* v. *Minnesota & P. R. R. Co.,* 92 U. S. 49 (23: 530), and in *Van Wyck* v. *Knevals,* 106 U. S. 360 (27: 201). In *St. Louis, I. M. & S. Rwy. Co.* v. *McGee,* 115 U. S. 469 (29: 446), it was said: 'That legislation to be sufficient (for that purpose) must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and *free from all doubt or ambiguity.*' See also *New Orleans-Pacific Railway Co.* v. *United States,* 124 U. S. 124 (31:383). As there is no pretense that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the government. * * *

"While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance. * * *

Of course, if the legal title passed to these Indians, something else than a failure to assert such title is necessary to divest it. * * * *To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case.*"

These cases are conclusive of the "abandonment" theory.

LV.

AT LEAST, CESSATION OF OCCUPANCY MUST BE IN PURSUANCE TO AGREEMENT OF CESSION TO CONSTITUTE ABANDONMENT.

In the court below defendants relied upon some expressions in cases to the effect that no one is permitted to settle upon the Indian lands until after the extinguishment of the Indian title and abandonment by the Indians. We believe it will be found that both of these elements must exist, viz., the extinguishment of the Indian title *and* abandonment; or else the abandonment must be in pursuance to the agreement of cession, and in that case the abandonment is construed as a carrying out of the agreement and in pursuance of it. Quoting from *Buttz* v. *No. Pac. R. R. Co.*, 119 U. S. 55:

> "The agreement, however, on the part of the Indians was only to cede their title, it was not a cession in terms by them. The officers of the Land Department, however, treated it as an actual cession of title from its date. The Indians had then retired to the Reservation set apart for them by the treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned, and *full consideration for it being afterwards paid, it could not be resumed.* The agreement in terms provided that it should be binding from its ratification. So, therefore, *considered in connection with the actual retirement of the Indians from the land,* it may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned.
>
> * * * * * *

"If we are mistaken in this view, and the relinquishment of the right of occupancy by the Indians is not to be deemed effected until the agreement was ratified by Congress in June, 1874, notwithstanding their actual retirement from the lands, the result would not be changed."

As the complainants never ceded this land, or agreed to cede it, there was no abandonment.

LVI.

THE CLAIM OF THE DEFENDANTS THAT THE INDIANS PARTED WITH THEIR TITLE BY THE TREATY OF TIPPECANOE RIVER OF OCTOBER 27TH, 1832, IS NOT TENABLE. THAT TREATY, IN CONCEDING TO THE UNITED STATES "THEIR TITLE AND INTEREST TO LANDS IN THE STATES OF INDIANA, ILLINOIS AND IN THE TERRITORY OF MICHIGAN SOUTH OF THE GRAND RIVER," DID NOT CEDE THE LANDS IN QUESTION. MILLIONS OF ACRES WERE STILL CEDED BY THE TREATY OF CHICAGO OF SEPTEMBER 26-27, 1833. (2 Kappler's Ind. Aff. 402.) WHAT WAS CEDED IN THE FORMER TREATY WAS THE INTEREST OF THE PARTICULAR BANDS TO THE LANDS CEDED ON THE DAY PREVIOUS BY THE OTHER CHIEFS OF THE POTTAWATOMIE NATION (2 Kappler's Ind. Aff. 367) AND DID NOT INCLUDE THE LANDS IN QUESTION. OTHERWISE THIS CESSION WOULD BE VOID FOR UNCERTAINTY, AS IT IS NOT BY METES AND BOUNDS AND DOES NOT STATE THAT ALL THE LANDS IN THOSE STATES WERE CEDED.

It will be contended by the defendants that by the Treaty of Tippecanoe River of October 27, 1832 (2 Kappler 372), the Pokagon Band, at least, conveyed the property in question to the United States. The

language of this Treaty upon which the claim is based is "The Chiefs and Warriors aforesaid cede to the United States, their title and interest to lands in the United States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River." The land here in question was not part of the Pottawatomie country which was being specially occupied by any constituent band, and the Pokagons had no more interest in it than any other constituent part of the Pottawatomie nation. The question at once suggests itself why should the Government take a conveyance from these "Pottawatomies of the State of Indiana and Michigan Territory," when some five millions of acres of Illinois upland remained still unceded and were only ceded to the Government the following year by the Treaties at Chicago (2 Kappler, 402 and 410)? The answer to the question is that the Government by the Treaty of October 27, 1832, obtained the ratification by these Indians of Michigan and Indiana of cessions of lands made to the Government by other branches of the Pottawatomie tribe or nation which had been made within the preceding few days. See Treaty of October 20, 1832, 2 Kappler, 353, and the Treaty of October 26, 1832, 2 Kappler, 367. In neither of these treaties had any portion of the bed of Lake Michigan or islands therein been ceded. Why, we ask, should such a cession be taken from the Indians of Michigan and Indiana when not taken from the others? Further, it cannot be contended that the Government would take cessions of the submerged lands of Lake Michigan in Illinois without including the portions of the lake in Indiana and Michigan. If

it was the intention to include any of the part of the lake within the boundaries of the state, then territory of Michigan, the cession of lands "in the Territory of Michigan south of Grand River" would be an absurdity.

Further, the court will note that the cession is not of *all lands* BUT *of lands*. If this cession was intended as anything more than a confirmation of these cessions previously made by other bands of the nation on October 20th and October 26, 1832, this cession would be void for uncertainty and for failure to describe any lands at all. We would not even need to invoke the rule of construction favoring Indians in the case of ambiguities.

> "If the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case."
>
> 3 Wash. Real Prop., 622.

In passing upon the validity of a levy under an execution, the Supreme Court of Illinois, said in *Hughes* v. *Streeter*, 648, 650:

> "There is nothing in the levy to limit and designate the portion of the half of the quarter that he owned. Had it stated that it was *all* of the land which he owned in the tract, or that it was *all* of the land he had acquired by pur chase from a particular individual, or some such reference to something else, by which it could have been located, it might have been sufficient. But we have no such reference, and we have no doubt that the description is so defective that no title whatever passed by the sale. This being the case, the defendant in error did not obtain anything by his purchase."

In *United States* v. *Heirs of Arredondo,* 13 Pet. 133, 135, this court said:

> "If, however, neither Alligator Creek can be found, nor any creek to the west of Alligatortown, entering into the Suwanee, within or at seven miles distance from the town, or a reasonable distance therefrom, and if Alligatortown cannot be found, then it is the opinion of this court that the remaining description in the petition of the locality of the concession is too indefinite to enable a survey to be made, and that the appellees can take nothing under the concession."

And then is to be considered the rule of interpretation to be applied to Treaties with Indians, that nothing is to be construed against them that is not clearly expressed. If the Government had intended to take a cession from this single band of Pottawatomies of any portion of Lake Michigan while taking no similar cession from any of the other constituent bands of that nation, some reason for it would have appeared and the intention would have been clearly expressed. Both reason and expression are absent from the Treaty, and the language of cession used, "south of Grand River," becomes incongruous in the light of such construction.

LVII.

THE GOVERNMENT IS BOUND TO CARRY OUT THE OBLIGATIONS OF A TREATY WITH THE INDIANS IN THE SAME MANNER AS AN INDIVIDUAL WOULD BE BOUND BY A CONTRACT.

If this were an ordinary controversy between individuals, not resting upon treaty obligations, it

could not reasonably be said that because the title had rested, say in the same family for over one hundred years, without change and without anything occuring to affect the title, that such title would be lost by mere lapse of time. The Government is bound to carry out the obligations of a treaty with the Indians in the same manner as an individual would be bound by a contract.

Crews v. *Burcham*, 1 Blk. 352.
United States v. *Reese*, 5 Dill. 409, Fed. Cs. 16-137.
Choate v. *Trapp*, 224 U. S. 665, 674.

LVIII.

A COURT CANNOT AMEND A TREATY BY CONSTRUCTION FROM GENERAL NOTIONS OF CONVENIENCE, ETC.

The real argument of the defendants, of which there was abundant intimation in the court below, was that the lands in question are too valuable to be awarded to the humble Indians. Even if this could be said to be a proper thing to consider, were the terms of the Greenville Treaty capable of any construction against the Indians, that Treaty cannot be actually amended by construction "from mere general notions of policy or convenience."

The Amiable Isabella, 6 Wheat. 1.
Lattimer v. *Poteet*, 10 Pet. 4.
Society, etc. v. *New Haven*, 8 Wheat. 464.
Strother v. *Lucas*, 12 Pet. 410.
Chew-Heong v. *United States*, 112 U. S. 536.
Tucker v. *Alexandroff*, 183 U. S. 424.

LIX.

EVEN TREATING THE INDIAN TITLE AS ONE OF PERMANENT OCCUPANCY THAT TITLE IS SUPERIOR TO THE TITLE OF THE GOVERNMENT AND LIMITS NECESSARILY ITS POWER OF DISPOSAL.

We believe that the terms "right of occupancy," "right of possession," etc., so frequently used in referring to the Indian title were matters of convenience to describe, for want of a more apt term, an inalienable title. However that may be, all the authorities agree that such a title is perpetual and until extinguished is superior to the title even of the Government. Of course, as we have elsewhere pointed out, we believe that the Greenville Treaty confirmed in the Indians a fee simple title to the lands in question. But even if it be treated as a title which is ordinarily called "right of occupancy" or "right of possession," that is perpetual and gives the Indians the full usufructuary right to the lands.

In the well-known case of *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733, the court had occasion to speak of the Indian title in the following terms:

> "As long ago as in *Cherokee Nat.* v. *Ga.,* 5 Peters 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *U. S.* v. *Cook,* 19 Wall. 591 (86 U. S. XXII, 210) this right of occupancy has been held to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not

peaceably enjoy their possessions with a superior race constantly encroaching on their frontier, with the ultimate fee vested in the United States coupled *with the sole right to buy that right, in case the Indians were willing to sell,* they were safe against intrusion if the Government discharged its duty to a dependent people. And this it has indicated a willingness to do, for in 1834 an Act was passed, 4 Stat. at L., 729, sec. 11, prohibiting, with heavy penalties, a settlement on the lands of an Indian Tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere.* For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it, violated the guaranties under which they had lived since that date."

In *United States* v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188, the court spoke of the Indian title as follows:

> "It is admitted that these Pembina Indians had the same right as other tribes to occupy their lands as long as they pleased, and that this right of occupancy could only be extinguished by voluntary cession to the Government."

For practical purposes, therefore, in the present case it is immaterial whether the Indians' title is one in fee simple or perpetual right of occupancy

or of possession. That perpetual right has not yet been extinguished. Until such extinguishment the Indians are entitled to the full use of their property for all possible, usufructuary purposes. The defendants cannot under the pretext of an abandonment by the Indians locate upon and take possession of this property.

Buttz v. *Northern Pacific R. R. Co.*, 119 U. S. 55.

LX.

IT IS NOT ENOUGH THAT THE COMPLAINANTS' ANCESTORS HAD REMOVED FROM THE VICINITY OF THE LANDS IN QUESTION. THEIR REMOVAL WITHOUT SALE DOES NOT AFFECT THEIR TITLE.

The foregoing is only a restatement of other propositions which we have heretofore endeavored to demonstrate. We refer again to the following cases:

Fellows v. *Denniston*, 5 Wall, 761.
New York v. *Dibble*, 21 How. 366.
United States v. 43 *Gals. of Whiskey*, 93 U. S. (3 Otto), 188.

The view of the court below in the course of the hearing, as at one time expressed, was that the United States, being the guardian of the Indians and having acquiesced heretofore in the possession of some of the lands by the defendants, must be considered to have waived the Indian rights to them. The relation of guardian and ward does not confer the right to confiscate Indian property, and such

property is protected by the 5th Amendment to the Constitution.

Choate v. *Trapp*, 224 U. S. 665, 678.

What the United States could not do by direct governmental or legislative action, it certainly could not be said to have done by implication or failure to act.

Some argument was made in the court below that Congress did have the power to revoke a Treaty even with the Indians, as was held to be the case in *Cherokee Tobacco* v. *United States*, 78 U. S. 616, and in other cases. But it will be found upon examination of those cases that the repeal related not to rights of property vested by treaty, but to what may be termed personal or political rights, which are always subject to control by Congress.

LXI to LXXV, Inclusive.

The remaining points noted in our brief, Nos. LXI to LXXV, inclusive, have either been embraced in one or more of the preceding points elaborated in our argument, and hence discussion of them would be mere repetition, or else they state rules of law well settled by decisions by this and other courts.

Concluding Remarks.

We come now to the conclusion of our argument. The complainants in this case are "a race once powerful, now reduced in numbers." They once owned the continent, of which but very small portions are left them. Little by little, they have given way to the superior energy and numbers of the white man; but what was taken from them was always under form of law. Even conquest was in the guise of "just and lawful wars," quoting the "Ordinance of 1787"; and after conquest came formal, and (ostensibly at least) voluntary, cession. What was ceded in the Northwest Territory was under pledge by the United States (2 Kappler, 42) to protect them "in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." The Indians now come into this court that that pledge may be redeemed. They ask it by the processes of peace. They are now weak and helpless, except as the law protects the weak with the strong. For many decades a treasure had lain hidden at the bottom of the Lake, all but forgotten. It is theirs. It is true, the presence of the white man has given it value, but it is none the less theirs. "The Indians cannot be despoiled of any part of their inheritance upon such a fallacious pretense" as enhanced values, said this court in *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733. We solemnly submit to this forum this supreme test of the good faith of the United States to the Indians. The test is as great as or greater than that which

confronted Chief Justice Marshall and his colleagues in *Worcester* v. *Georgia*, 6 Pet. 515. The administrative agencies are waiting for this tribunal to advise them as to their duty. The great traditions of this court give us courage to believe that the United States will stand true to the last by its word of promise to the Red Man.

It is respectfully submitted that the complainant Indians have made out a *prima facie* case of previous ownership of the lands in question, and thereby raised a presumption of title in themselves under Section 2126 R. S.; that the burden of proof rests upon the defendants; and hence the court below erred in dismissing the amended bill of complaint.

That, therefore, the decree of the court below should be reversed, etc.

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APPENDIX A.

Abstract of the Indian title to land contiguous to the City of Chicago, Illinois and lying just east of the original meander line surveyed by the United States in 1821.

By Charles Henry Butler.

TITLE PRIOR TO 1763.

1. Prior to 1763 Great Britain, France and Spain claimed the whole of the Atlantic seaboard and the Mississippi watershed by virtue of their rights of discovery and occupation, under the rule of international law that the European governments had the right to colonize and assert jurisdiction over all lands discovered by their subjects and which were not inhabited by civilized people. These claims were necessarily subject to the ownership of the soil by the Aboriginal tribes inhabitating the discovered country. The claims of France and Spain were eliminated by the treaties made in 1763, after the French and Indian wars, and the exclusive right of Great Britain, as a discovering country, to the whole of what now constitutes the Northwest Territory was admitted as between all European powers (see opinion of Chief Justice Marshall in *Johnson* v. *McIntosh*, U. S. Supreme Court, 1823, 8 Wheaton, 543).

2. Prior to 1763 Great Britain had entered into negotiations with various Indian tribes for the purpose of extinguishing the Indian title to the territory occupied by the colonists. The Six Nations recognized the sovereignty of Great Britain by a treaty made in 1744; subsequently a boundary line based upon this treaty was located upon Mitchell's Map, which will be referred to hereafter, and which has been admitted by the Governments of Great

Britain and the United States to be correct and accurate.

This line was a demarcation between Indian and British sovereignty as well as ownership, so far as it affects the property in question it commenced at the Mississippi River, passing thence up the Illinois River, and leaving it about 150 miles southwest of Lake Michigan, struck the lake at a point then called Quodagha (now Michigan City, Indiana) about forty miles southeast of Chicago; *from thence it passed through Lake Michigan* in a northerly direction along the easterly side of the lake at an average distance of about three miles from the eastern shore, to the Straits of Mackinaw, through which it passed into Canada, and from thence easterly through the Ottawa River to the St. Lawrence.

To the eastward of this line the sovereignty of Great Britain was recognized; to the westward, however, the title to the soil and the sovereignty over the territory remained in the Indians, and the treaty cessions by Spain and France conveyed to Great Britain no additional title to the soil, as there had been no relinquishment to those governments of their title by the Indians.

FROM 1763 TO 1783.

3. From 1763 to 1783 was the period of the struggle of the North American colonies of Great Britain for their independence, the eventual success whereof was evidenced by the treaties of peace between the United States and Great Britain, in which the independence of the colonies was recognized. During this period no treaties were made by any of the Indian tribes either with Great Britain or with the United States or any of the states or colonies which in any way affected the ownership of the Indian tribes of any of their territory west of the Indian line referred to in the last section, or of any territory which includes the property the title to which is under consideration.

NATIONAL BOUNDARIES AS FIXED BY TREATY OF 1783.

4. At the close of the Revolutionary War two treaties of peace were concluded between the United States and Great Britain, one known as the Provisional Articles was concluded at Paris, November 30, 1782 (*United States Treaties and Conventions,* 1889); also known as the Definitive Treaty of Peace, which simply consisted of the Provisional Articles re-executed and ratified as a final settlement September 3, 1783 (*United States Treaties and Conventions,* 1889, page 375; *United States Treaties in Force,* 1889, page 200).

Article II (identical in both treaties) fixed the boundaries of the United States as between the United States and Great Britain; that part of the line affecting the Northwest Territory is as follows:

> "Along the middle of the said Rivers (Iroquois or Carterqui) *into Lake Ontario; through the middle of said lake* until it strikes the communication by water between that lake and Lake Erie; *through the middle of said lake* until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence *through the middle of said lake* to the water communication between that Lake and Lake Superior; thence *through Lake Superior* northward of the Isles Royal and Philippeau to the long lake; thence through the middle of said long lake and water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most northwestern point thereof, and from thence on a due course to the River Mississippi, thence by way of a line to be drawn along the middle of said River Mississippi until it shall intersect the most northernmost part of the 31 degree of North latitude."

These boundary lines not only included all the territory claimed by the States under their original charters as colonies, but also a great tract which was afterwards known as the Northwest Territory. While Great Britain recognized these boundaries of the United States, renouncing all claim of ownership to everything included therein, it was wholly without regard to the Indian title; the rights of the Indians, who were not in any way represented in the negotiation of the treaties, remained exactly the same as to the United States as they had formerly existed as to Great Britain. All that Great Britain could do as to Indian titles which had not been extinguished prior to the recognition of the Independence of the United States, was to relinquish to the United States the right of extinguishing that title. The Indian titles formed a more important element in the peace negotiations of the treaty of Ghent, in 1814, after the conclusion of the War of 1812, than they did in 1783, for the experience of the countries after the close of the Revolutionary War showed them that the rights of the Indians and their ownership in the soil could not be disregarded without serious consequences to the people of both countries.

The Virginia Cession.

5. After the independence of the United States had been recognized questions arose between the States as to the ownership of a great extent of territory which had been included in boundaries fixed by the treaties as belonging to the United States, but which was not included within the admitted boundaries of any of the colonies. Some of the smaller States refused to accede to the Articles of Confederation until the larger States had either relinquished their claims to, or ceded, the Western Territory to the Central Government for two purposes: First, to prevent the great inequality in strength and size between the large and small States, and, secondly, to furnish the Central Government with the means of defraying the great debt

which had been incurred in the war for independence. This refusal finally resulted in a number of the States making cessions of territory to the Central Government; the one affecting the Northwest Territory concerns us the most, that being the cession made by Virginia of all of the territory claimed by the State northwest of the River Ohio under its charters and by virtue of the conquests made by Colonel George Rogers Clark.

ORDINANCE OF 1787.

6. On July 13, 1787, after accepting the cession, the Congress of the United States under the Confederation enacted the "Ordinance for the Government of the Northwest Territory" covering the territory of the United States northwest of the River Ohio. Meanwhile the question of Indian title to the territory of the United States had become a very serious one, and in the passage of the Northwest Ordinance the rights of the Indians were fully protected, not only for the benefit of the Indians, but also for the protection of the people of the States and to prevent the constant outbreak of Indian hostilities.

The Ordinance for the Government of the Northwest Territory is a part of the organic law of the United States. In the Revised Statutes, published by the Government, the following articles are described as the organic law of the United States of America: (1) Declaration of Independence, promulgated July 4, 1776; (2) the Articles of Confederation, adopted 1777-1783; (3) the Northwest Territorial Government, adopted 1787; (4) the Constitution of the United States, adopted 1787.

7. Section 14 of the Ordinance of 1787 (U. S. Revised Statutes 1878, p. 15, of Organic Laws) is as follows:

> "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, be-

tween the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent."

Article III of that compact, which by its terms is to remain unalterable *forever*, and places good faith towards the Indians on the same basis as religion, morality and knowledge, is as follows:

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded upon justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Article IV of the compact, looking forward to the time when States should be carved out of the Territory, provided that the legislatures of districts into which the territory should be laid out, "that new States shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers."

The Ordinance provided that in laying out judicial districts in the territory, proper divisions could be made thereof in those parts *"in which the Indian title shall have been extinguished."* So sacred has the Northwest Ordinance been considered that Mr. Justice Story, in his Commentaries on the United States, has declared that it is even paramount to the Constitution. Notwithstanding all of the changes and transfers from colonies and States to the United States, the laying out of divisions and subdivisions of territories and the acquisition and

admission of States, the organic or fundamental law of all of the States which have been carved out of the territory is paramount by the Ordinance of 178[illegible]; the rights of the Indians as they existed at or prior to the adoption of the Ordinance, and as they exist today, have been, and still are, protected by its terms, and *any Indian title which existed in* 1787, *and has not been extinguished by an actual cession by the Indians themselves, exists today with the same force and effect as it existed in* 1787.

Early Indian Treaties.

8. After the cessions had been made by Virginia and the other States, and the Northwest Ordinance had been adopted, and settlements began to be made in the Northwest Territory, the United States adopted the policy of extinguishing the Indian title wherever it could do so and a series of treaties were made with the Indian tribes.

The treaties which relate to property situated in the Northeastern part of Illinois and the adjoining waters of Lake Michigan were made with the Pottawatomie Indians, who, with the Ottawas and Chippewas, were the owners and sovereigns of that part of the North American continent, and have been so recognized since the earliest settlements in America.

The territory of the Pottawatomies extended from the line which was laid out on the Mitchell map (see Section 2 *ante*) at the eastern side of Lake Michigan westward over the lake, and what is now parts of the States of Indiana and Illinois to land of the Sacs and Foxes, who occupied the territory between the Western limits of the Pottawatomies and the Mississippi River. The Chippewas and Ottawas were allied with the Pottawatomies, and in dealing with the aboriginal owners of this part of the Northwest Territory of the United States generally associated those three nations with them. The general policy adopted by the Government in extinguishing the Indian title was to make a treaty in which lines were fixed, on one side of which the United States would

be the owner and sovereign of the soil, and on the other side the Indian title would remain intact, all claim thereto being relinquished by the United States and the Indians guaranteed in their ownership in and sovereignty over such lands.

9. The earliest treaty made by the United States with the Pottawatomie Indians was at Fort Harmar, January 9, 1789 (*Indian Treaty Volume*, 1825, p. 43) in which a boundary line was fixed between that, and other allied nations and the territory of the United States, as the treaty states, "to the end that the same may remain as a divisional line between the lands of the United States of America and the lands of said nations forever."

The Greenville Treaty.

10. The Fort Harmar treaty seems to have been succeeded by serious hostilities between many of the Indian tribes in the Northwest Territory and the United States, which continued until 1795, when a treaty of peace was made at Greenville by Major General Anthony Wayne, who had been appointed a special commissioner for that purpose on behalf of the United States, with twelve of the Indian tribes, including the Pottawatomies, and which superseded all treaties made with those tribes since the treaty of 1783 between the United States and Great Britain, that came within the purview thereof. (*Indian Treaty Volume*, 1873, p. 184.)

By Article II. The Indians ceded and relinquished forever all their claim to the land lying eastward and southward of a general boundary line, and agreed that those lands or any part of them should never thereafter be made "a cause or pretext on the part of said tribes or any of them, of war or injury to the United States or any of the people thereof." The Indians also ceded sixteen specified parcels of land on the Indian side of the boundary line No. 14 whereof was designated as follows: "One piece of land six miles square at the

mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood." They also agreed to "allow to the people of the United States a free passage by land and by water, as one or the other shall be convenient, through their country along a chain of posts," which was specifically described, and which passed through Port Chicago on Lake Michigan. They also agreed to "allow to the people of the United States the free use of the harbors and mouths of rivers adjoining Indian lands in sheltering their vessels and boats, and particularly to land their cargoes when necessary for safety." These concessions indicate ownership of the territory including Lake Michigan with a mere right of transit for commerce thereover. The United States, on its part, "in consideration of peace and of the cessions and of the relinquishment of lands made in the preceding articles by the said tribes of Indians, and to manifest the liberality of the United States as the great means of rendering this peace strong and perpetual, "relinquished their claims to all other Indian lands northwest of the River Ohio, eastward of the Mississippi and southward of the Great Lakes and the waters uniting them, *according to the boundary line agreed on by the United States and the King of Great Britain in the treaty of peace made between them in the year* 1783." From this relinquishment certain specified tracts of territory were excepted, none of which, however, affect the property under consideration, all of which were included in the great extent of territory which the United States solemnly relinquished on that occasion.

INDIAN TREATIES SUBSEQUENT TO 1795.

11. The Greenville treaty was followed by a supplemental treaty made at Fort Wayne in 1803, which related, however, solely to land in the neighborhood of St. Vincennes (*Indian Treaty Volume* 1823, p. 370), a treaty made at Fort Industry July 4, 1805, establishing a new boundary line somewhat

west of the Greenville line, the Indians ceding and relinquishing certain land to the United States (*Indian Treaty Volume*, 1826, p. 60): A treaty made at Grausland, near Vincennes, in 1805 (proclaimed April 21, 1806), also relating to certain territory near Vincennes (*Indian Treaty Volume* 1873, p. 371); none of these treaties affected the land under consideration. By a treaty made by Governor Hull at Detroit November 17, 1807, (*ditto*, p. 192), *certain territory was ceded to the United States, a part of which was in Lake Huron; the boundaries of the tract ceded coincided with the boundaries recognized by Great Britain and described in the treaty of* 1783. This treaty is referred to, not as affecting the land under consideration, but as showing that *when the Indians conveyed land included in the lakes the boundary lines were continued through the lakes in the same manner as though the entire tract was upland, leaving nothing to be conveyed by implication or under the doctrine of riparian rights.*

On November 25, 1808, Governor Hull concluded a treaty at Brownstown (*ditto*, p. 194), in which the United States recognized the Indian ownership of the unceded territory by the following preamble: "Whereas (describing certain lands) still belong to the Indian nations so that the United States cannot of right open and maintain convenient road from the settlements in the State of Ohio to the settlements in the territory of Michigan, nor extend those settlements so as to connect them"; this preamble was followed by a cession of territory, which shows that the United States recognized that even for such purposes as making a road, which would ordinarily come within the right of eminent domain, it could not, under the unalterable compact contained in the Northwest Ordinance and the subsequent treaties of Indians, take any Indian land whatever. Treaties were made by General Harrison on September 30, 1809, at Fort Wayne (*ditto*, p. 375) and January 16, 1810, at Vincennes (*ditto*, p. 373), which do not, however, affect the property in question.

12. When the War of 1812 between the United States and Great Britain commenced no cession had been made by the Pottawatomie Indians of any part of what is now the northern district of Illinois, or of the bed of Lake Michigan contiguous thereto, with the exception of the tract six miles square, referred to in the Greenville treaty of 1795 (Section 10, *ante*). The United States and Great Britain were both anxious to secure the co-operation of the Indians of the Northwest Territory. It does not appear that any treaties were made by the Pottawatomies and the United States until 1814, when on July 22, General Harrison made a treaty at Greenville (*Indian Treaty Volume*, 1873, p. 1032), by which they and some of the other tribes "agreed to give their aid to the United States in prosecuting the war against Great Britain and such Indian tribes as still continued hostile, and to make no peace with either without the consent of the United States." The assistance therein stipulated to be given to the United States was to consist of such number of warriors of each tribe as the President might require. As a consideration for the faithful performance of the conditions of this treaty it was agreed that the United States would confirm and establish all the boundary lines between their lands and those of the Wyandotts, Delawares, Shawnees and Miamies as they existed previously to the commencement of the war; a note in the Indian Treaty Volume, published by the United States Government in 1825, says that *the lines referred to coincided with the boundary lines between the United States and Great Britain.* The boundaries of the Pottawatomies were not referred to, but they united in the treaty."

Within a few months after the negotiation of this treaty peace was concluded between the United States and Great Britain by the treaty of Ghent, executed December 24, 1814.

THE TREATY OF GHENT.

13. While the War of 1812 was undoubtedly precipitated by the conduct of Great Britain in searching American vessels on the high seas, and impressing seamen therefrom in the royal navy, one of the most aggravating causes of the friction was the constant stirring up of hostilities between the Indian tribes on the western frontiers; an important element, therefore, in the peace negotiations at Ghent was the adjustment of the Indian boundary lines, and the relations of the Indian nations with Great Britain and the United States. A special article (No. IX) was inserted in the Treaty of Ghent (*December* 24, 1814; *U. S. Treaties and Conventions* 1889, p. 399), *as follows*:

> "The United States engage to put an end, immediately after the ratification of the present treaty, to the hostilities with all the tribes of nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to the said tribes or nations respectively all of the possessions, rights and priviliges which they may have enjoyed or been entitled to in 1811, previous to such hostilities. Provided always, that such tribes or nations shall agree to desist in all hostilities against the United States of America, their citizens and subjects upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly."

This was followed by a corresponding provision imposing the reciprocal obligations on the part of Great Britain as to the Indians on the northeast side of the boundary line. The subsequent action of the United States in confirming the Indians in their former possessions was therefore not only the result of contract between the United States and the Indians, but it was a fulfillment of an obligation assumed by the United States to Great Britain as one of the elements in the peace treaty concluded at

Ghent; the Indians in this respect received only what the two belligerent nations agreed should be done for them, and it would have been a breach of the obligations assumed by the United States toward Great Britain if it had not fulfilled the terms of the Treaty and reinstated the Indians in their original possessions.

Greenville Treaty Renewed.

14. Pursuant to the terms of the treaty of Ghent, Governor Harrison, on September 8, 1815, entered into a treaty at Springwells, with the Pottawatomies and other Indians, in which it was recited that, although the Pottawatomie Indians had taken part with Great Britain (those in the northern district of Illinois and at the southwestern corner of Lake Michigan had, as a matter of fact, remained loyal to the United States), but had manifested a disposition to be restored to a position of peace and amity with the United States, the United States agreed by Article II of this treaty to restore to the Chippewa, Ottawa and Pottawatomie tribes "all possessions, rights and privileges which they enjoyed or were entitled to, in 1811, *prior to the commencement of the late war with Great Britain,*" said tribes, on their part, agreeing again to place themselves under the protection of the United States and of no other power whatsoever. *The treaty of Greenville, of* 1795, and all subsequent treaties to which these tribes were parties were *renewed, ratified and confirmed* by Article IV of the Springwells treaty "in as full a manner as if the same were inserted in the treaty."

The St. Louis Treaty of 1816, Ceding Site of Chicago.

15. On November 3, 1804, the United States made a treaty with the Sacs and the Foxes (*Indian Treaty Volume*, 1826, p. 230) who claimed the land lying eastward of the Mississippi, extending from that river to the land of the Pottawatomies, by which

those tribes ceded a large tract of territory to the United States. The Pottawatomies claimed that the Sacs and the Foxes had conveyed more land than they were the owners of and that the easterly part of the ceded tract overlapped the west bounds of the Pottawatomies. To adjust this dispute a treaty was made at St. Louis, with the Pottawatomies, Ottawas and Chippewas residing on the Illinois and Milwaukee Rivers and their waters and on the southwestern parts of Lake Michigan (*Indian Treaty Volume*, 1873, p. 150) by which these nations confirmed to the United States on certain conditions a part of the cession of the Sacs and the Foxes above referred to.

Up to this time from the earliest period at which negotiations commenced with the Indians, either with Great Britain or with the United States, *there had been no cession of any kind whatsoever of any territory on the southwestern shore of Lake Michigan, or in that vicinity,* with the exception of plot No. 14 referred to in the original Greenville treaty of 1795 as conveying "one piece of land six miles square at the mouth of the Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood." (See Section 10 *ante.*)

There is no record that the United States had ever availed of the permission in the Greenville treaty to survey that plot, although the United States had erected Fort Dearborn on that location.

The St. Louis treaty of 1816 consisted of three articles, the first of which is a relinquishment by the Indians of their rights and title to the land mentioned in the treaty made by the Sacs and the Foxes south of a line drawn due west from the southern extremity of Lake Michigan. This is followed by an absolute cession of a strip of land having a frontage on Lake Michigan from a point ten miles north of the mouth of the Chicago creek to a point ten miles south therefrom, and extending in a southwesterly direction from forty to sixty miles to various points on the Kankakee and Illinois Rivers. The exact description is as follows:

"Article I. The said chiefs and warriors, for themselves and the tribes they represent, agree to relinquish, and hereby do relinquish, to the United States, all their right, claim and title to all the land contained in the beforementioned cession of the Sacs and Foxes, which lies south of a due west line from the southern extremity of Lake Michigan to the Mississippi River. And they moreover cede to the United States all the land contained in the following bounds, to wit: Beginning on the left bank of the Fox River of Illinois, ten miles above the mouth of said Fox River; thence running so as to cross Sandy Creek, ten miles above its mouth; thence, in a direct line, to a point ten miles north of the west end of the portage between Chicago Creek, which empties into Lake Michigan, and the River Depleine, a fork of the Illinois; thence, in a direct line, *to a point on Lake Michigan, ten miles northward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of the said Chicago Creek;* thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois River, to the mouth of Fox River, and thence to the beginning: *Provided, nevertheless,* that the said tribes shall be permitted to hunt and to fish within the limits of the land hereby relinquished and ceded, so long as it may continue to be the property of the United States." (*Indian Treaties,* 1873, p. 151.)

By the second article of the treaty the United States agreed to pay for the land a stipulated price and also agreed to relinquish to the said tribes "all of the land contained in the aforesaid cession of the Sacs and the Foxes which lies north of a due west line from the southern extremity of Lake Michigan to the Mississippi River," with the exception of certain other tracts which were specified and were not to exceed eight leagues of land in the aggregate.

This is the first cession by metes and bounds of the land upon which the greater part of the City of Chicago has been built. *No cession was made of any land lying east of the shore of Lake Michigan.* The ceded plot was bounded "along the lake" and carried no riparian rights of any water or land below the water of Lake Michigan; in this respect it is different from the description in other treaties made with the Indians where lakes or parts of a lake were conveyed, especial attention being called to the treaty of 1807 (see *Section* 11, *ante*), in which a part of Lake Huron was ceded by boundary lines which passed directly through the lake, nothing being left to implication or constructive conveyance, but the entire tract ceded, land and water alike being included within the specified metes and bounds.

No claim can be based upon this cession for anything east of the line which was subsequently surveyed and measured by the United States, except under the constructive claim that the waters of Lake Michigan passed with the upland as a matter of law; this claim cannot, however, under any circumstances, apply to the land eastward of the tract as described and which was above water, such as islands lying off the shore of Lake Michigan.

Treaties Subsequent to 1816.

16. From 1916 to 1832 a number of treaties were made with the Pottawatomies, Ottawas and Chippewas and some of the tribes thereof, which will be found in the Treaty Volume of the United States of 1873 (see Index, p. 1068), where all of the treaties referred to in this abstract will be found, but none of them relates to the property in question. Many cessions were made of specified plots, but *none of them affected any land in the northern district of Illinois or on any part of Lake Michigan, or the land forming the bed thereof.*

On March 25, 1832, a treaty was made between Lewis Cass and the Pottawatomies and other Indians (*Indian Treaty Volume*, 1873, p. 152) which

contained a cession of land on Lake Michigan near the River St. Joseph, the boundary on the lake "*following the shore of Lake Michigan.*" *This does not, however, affect any part of Lake Michigan in the vicinity of Chicago.* The treaty of September 20, 1829, also ceded a plot on Lake Michigan, which was near the northern boundary line of the State of Indiana, one course of which ran "*thence with the shore of the said lake.*" This was south of the plot ceded in 1816. By a treaty proclaimed January 2, 1830 (*ditto*, p. 161), a cession was made the southern and eastern boundaries whereof were "along the northwestern boundary line of the cession of 1816 *to Lake Michigan; thence northwardly along the western shore of Lake Michigan,*" etc.

17. On January 21, 1833, a treaty was made with the Pottawatamies of the Prairie and Kankakee (*Indian Treaty Volume*, 1873, p. 697) by which a tract of land was ceded to the United Sttaes included within the following boundaries:

> "Beginning at *a point on Lake Michigan* ten miles southward of the mouth of Chicago River; thence, in a direct line, to a point on the Kankakee River ten miles above its mouth; thence, with said river and the Illinois River, to the mouth of Fox River, being the boundary of a cession made by them in 1816; thence, with the southern boundary of the Indiana Territory, to the State line between Illinois and Indiana; thence, north, with said line *to Lake Michigan; thence, with the shore of Lake Michigan*, to the place of beginning."

This plot adjoins the cession of 1816 on the south; it was made fifteen years after Illinois had become a state. Whatever territory was conveyed by this cession of 1833 became a part of the public domain of the United States, as it existed in 1833, and *under no circumstances could any part thereof whether an appurtenant or actually included in its boundaries, have become the property of the State of Illinois.*

INDIAN REMOVALS TO POINTS WEST OF MISSISSIPPI.

18. In 1833 the United States adopted the policy of transferring the Indians from their original seats and territory east of the Mississippi to new reservations west of the Mississippi. This could only be done with the Indians' consent and pursuant to treaty stipulations. The Indians were the rightful owners of the soil and could not be dispossessed therefrom except with their own consent. This was peculiarly the case in regard to the Pottawatamie Indians and the tribes associated with them, as they were protected not only by general principles of ownership, but also by the *unalterable compact* contained in the Ordinance of 1787 and by the special stipulations in the treaty of Ghent, as well as by the other treaties made by the United States relinquishing all ownership to lands not specifically ceded by the Indians, and guaranteeing them in their possession of the territory unceded by them. Inasmuch, however, as the United States was the stronger nation, and as the Indians were unable to resist, treaties were made by some of the tribes; in many cases these treaties were actually made by duress; *in all cases the treaties must be construed liberally for the Indians and strictly against the United States.* The general rule of construction of Indian treaties as laid down by the Supreme Court is that, inasmuch as the Indians are wards of the nation, whatever has been done by the United States to deprive them of their property must be construed as liberally as possible for the Indians.

19. The principal treaty relating to the removal of the Pottawatamie Indians was made at Chicago, September 26, 1833, (*Indian Treaty Volume*, 1873, p. 164), by the "United Nations of the Chippewa, Ottawa and Pottawatamie Indians," who ceded "to the United States all their land *along the western shore of Lake Michigan* between this lake and the lands ceded to the United States and the Winnebago Nation by the treaty of Fort Armstrong, September 15, 1832 (*ditto*, p. 998)." This cession was

supposed to contain about 5,000,000 acres; in consideration therefor the United States agreed to give to the Indians a tract of corresponding size west of the Mississippi, which was afterwards located in the neighborhood of the other great Indian reservations. This cession did not include any cession previously made by the Indians, either under the name of the Pottawatamies or the Pottawatamies of the Prairie and Kankakees. The southmost point on the shore of Lake Michgan, at the southeastern corner of this cession, coincided with the northernmost point of the northeastern boundary of the cession previously made in the treaties of 1816. Some of the bands or tribes of the Pottawatamies did not accede to this cession. They desired to remain in Michigan, and accordingly a supplementary treaty wsa made on the same day, but *no cession of any part of Lake Michigan was contained therein.* (*See Supplementary Articles, ditto* p. 176).

A treaty had been made by the Pottawatamies of the state of Indiana and the territory of Michigan on the 27th day of October, 1832 (*ditto,* p. 701), by Article 1, of which the chiefs and warriors ceded to the United States their title and interest to the lands in the states of Indiana and Illinois and in the territory of Michigan south of the Grand River; but *the records of the Office of Public Lands in the Department of the Interor do not show that under this treaty any lands forming islands east of the meander line of Lake Michigan ever passed into the public domain of the United States, and that it never was considered that this treaty extinguished any title to any such islands is evidenced by the declaration of the Indian Commissioner, hereafter referred to.*

20. The Indian Treaty Volume of the United States shows that a number of treaties were made with the bands of the Pottawatamie Indians during the years 1833 to 1837 (see list in Index p. 1068), either providing for their emigration west, or giving certain plots of land east of the Mississippi; *none of these treaties contains any cessions of any part of the bed or the islands in Lake Michigan;*

after the Pottawatamie Nation, or the principal part thereof numerically considered, had emigrated west of the Mississippi, treaties were made between the Pottawatamies, Chippewas and Ottawas and the United States in 1846 (*ditto*, p. 121), 1862 (*ditto*, p. 690), 1866 (*ditto*, p. 690) and 1868 (*ditto*, p. 691); *in none of these treaties were any cessions made which could affect the title to any property forming the bed of Lake Michigan or any islands therein.*

CONSTRUCTION BY GOVERNMENT OFFICIALS.

The foregoing resume' of Indian treaties shows that *the Indian title has never been extinguished by a specific cession of land east of the meander line laid down, and which will be referred to hereafter,* by which the boundary or demarcation line was established between territory belonging to the United States in which the Indian title was extinguished and which, in conformity with the provisions of the Northwest Ordinance, could be laid out in States, townships, and counties, and the land in which the title was never extinguished, and which the unalterable nature of that article could not be included in any counties or townships. This is the view taken by the United States, and expressed through the only Department of the Government, which lawfully can express it, to wit: The Department of the Interior, which has full charge, not only of the public domain, but also of all relations with Indians, as is evidenced by a letter written by the Commissioner of Indian Affairs, W. A. Jones, June 21, 1899, in which, after reviewing all the treaties made with the Pottawatamies and associated tribes, including all those that are above mentioned, *he declares that the Indian title has not been extinguished in any islands lying in Lake Michigan near Chicago,* unless by the terms of the treaty of 1846. The letter is lengthy. The last paragraphs only are quoted. They express the opinion of the Department as follows:

> "These treaties show you what islands along the western shore of Lake Michigan in the vi-

cinity of Chicago, have been ceded by the Ottawas in conjunction with other tribes, none of which makes any reference to the island referred to by the Indians making the affidavit transmitted, to which they lay claim. *The treaties herein referred to prior to* 1846, *do not convey any cession of any island in Lake Michigan near Chicago,* and if the Ottawa Indian title to such island has been extinguished, it must have been by the treaty of 1846, when the three tribes became consolidated as 'the Pottawatamies Nation.'

"The Ottawas of Michigan by the treaty of July 31, 1855, released the government from all liability for all land guaranted to them by former treaties.

"This communication is perhaps longer than such affidavits usually demand, but as the question of title to a large portion of the 'Chicago front' and small islands along the lake shore occupied by fishermen, is now in litigation, it has been deemed best to give you the substance of all treaties made with the Ottawas bearing upon the land in that vicinity."

This declaration is important, as it has been made recently by the Department with full knowledge that the title to property of vast value, which is now apparently included within the business limits of the City of Chicago, and that the final determination of the questions involved depend upon whether or not the Indian title has been extinguished; notwithstanding, however, the enormous values involved, and the weight which must necessarily be given to any communication of this nature, *the Department of the Interior of the Government of the United States has unqualifiedly placed itself upon record as declaring that the Indian title to islands in Lake Michigan has never been extinguished,* unless it could be so construed under the treaty of 1846. There is only one cession in the treaty of 1846, and that is limited by its terms expressly to lands in the state of Iowa and Missouri, and therefore the only

qualifying clause in the letter of the Indian Commissioner is disposed of, and *the Department must be considered as having expressed the opinion that the Indian title to islands in Lake Michigan has never been extinguished.*

22. The view expressed by the Commissioner of Indian Affairs to the effect that *nothing east of the meander line belongs to the United States,* is not based upon Indian treaties alone, but also upon decisions made by the Department of the Interior relating to public lands. There is a regular court for the determination of land titles held by the Commissioner of Public Lands, and his decisions, while they are not those of a regular court of record under the Constitution, create precedents and establish rules which are followed by the Department and by the courts.

In the *LaFollette* and *Benner* case (*Vol.* 26, *Land Department Decisions,* p. 453), decided April 2, 1898, it was held that the *land in question was not a part of the public domain of the United States and never had been.*

On pages 457-8 Secretary Cornelius N. Bliss, in an opinion prepared by Assistant Attorney General Van Devanter sustaining a decision of the Land Commissioner, said:

> "It is claimed by the applicants that a strip of land lying outside of the eastern line of said north fraction as established by said survey and between that line and the waters of Lake Michigan was not included in said survey and remained unsurveyed public land of the United States. However this may be, the fact is that large additions have been made to the land as it then existed until now there is a tract lying between the survey line of 1821 and the present water line of Lake Michigan, estimated to contain over one hundred and sixty acres. These additions resulted in part from natural accretions and in part from artificial causes. The addition was at first by way of natural accretion which was afterwards accelerated by the

building of piers into the lake and by the dumpage of refuse from the city. About the year 1891 the board of commissioners of Lincoln Park, under the authority of a statute of the state of Illinois, began the construction of a driveway in the lake some distance from the shore line as it then existed and the filling in behind this driveway has progressed rapidly until now the body of land between the original survey line and the present shore line has reached the area above mentioned. Two of the protestants against the allowance of the application of LaFollette and Benner have heretofore sought to acquire title to parts of this tract under the homestead law and by the location of script still assert a right thereto if the land be determined to be public. The other protestants generally claim to be owners of parts of said tract by virtue of the ownership of the land bordering on the original shore line. All applications heretofore made to acquire title to this land under any of the public land laws have been denied upon the ground that the government has not title thereto."

23. Questions of riparian rights and other matters affecting a large part of the property the title to which is under consideration are discussed in this action, and several decisions are referred to in which it has been decided that "the land applied for is east of the original meander line of the lake, as shown by the public surveys of 1821. As such it is not safe to private entry or any other kind of entry under the Public Land laws."

The disclaimer of ownership by the United States to this tract is further emphasized by the fact that the records of the public lands situated in the state of Illinois were kept for many years, until finally, the United States Land Office for public lands in that state was wound up on the theory that "all the lands in that state had been sold."

As to the few plots remaining the state officials were made custodians for the United States, and on

the plats and maps showing the public lands nothing has ever appeared east of fractional township 30, east of the line fixed by John Walls in 1821.

Pottawatamie Title Remains Intact.

24. In the foregoing sections all of the Indian treaties affecting the property have been reviewed, and *they appear to sustain the opinion of the Commissioner of Indian Affairs that the Indian title has not been extinguished.* All the facts relating to the Indian title having been considered and disposed of, and as they show that so far as the extinguishment of the Indian title by cessions of the Indians, which is the only possible way that the title could be extinguished in the northwest territory, *the title still exists, exactly as it did in* 1787, *it remains only for counsel preparing this abstract to express as his opinion that the title of the Indians to all land lying east of the meander line of fractional township* 39, *as fixed by the United States surveys, remains intact,* and that the only question which can arise in that respect is, as between the Pottawatamie Indians, which tribe or band is the rightful successor to the ownership of the lands east of the Mississippi and remaining unsold or unceded. That is a matter which must be settled by and between the Indians themselves, according to the Indian code of laws, which, as between Indian and Indian, and Indian tribe and Indian tribe, are thoroughly settled and established by the customs, laws and traditions of the Indian nations.

Title Not Lost by Adverse Possession.

25. The treaty relations between the United States and the Indians have been considered in this abstract consecutively from the first treatry of 1789 to date, without stopping to take into consideration any other matter affecting the title to the property resulting from the possible effect thereon of claims made by the state of Illinois, the city of Chicago and the purchasers from the United States of lands

lying *west* of the meander line and bordering upon the shore of Lake Michigan. Properly speaking, inasmuch as the Indian title has not been extinguished, none of these questions can affect the title, for by the Articles of Compact in the Northwest Ordinance, which by the terms of the instrument are to remain unalterable forever, *the Indians are as fully protected today in their ownership of land as they were in* 1787; if the proposition asserted by counsel in the preceding section to the effect that the Indian title is still intact, can be maintained, the claims of state, city and private owners necessarily fall to the ground, as no claim can be established against Indians by adverse possession. *As a matter of fact, as well as of law, no adverse possession can be asserted or maintained as to the bulk, if not all, of the property under consideration; some of it has not been filled in at all—other parts, while filled in, are still unoccupied.*

Effect of Legislative Acts.

26. As various parties, however, have asserted claims to the property, basing them upon titles founded upon legislative acts of the state of Illinois, either directly, or through the alleged ownership of the city of Chicago, it will be necessary to consider the history of the property and some of the legislative acts which have been passed, and under which certain persons claimed to have acquired either title to, or a rightful occupancy of some of the property under consideration. We will first consider the historical facts relating to the admission of Illinois as a state and the subsequent acts by the legislature of that state as to what is known as the Chicago lake front.

No Title in State Upon Admission Into the Union.

27. After the cession made by the Indians in 1816 an enabling act was passed by Congress permitting the organization of the state of Illinois pursuant

thereto; a state constitution was adopted, and by resolution of Congress of December 3, 1818, the state of Illinois was admitted into the Union on an equal footing with the original states; the preamble of the resolution declared that the state should be admitted because its constitution and governments were republican "and in conformity to the principles of the Articles of Compact between the original states and the people and states in the territory northwest of the Ohio River, passed on the 13th day of July, 1787."

The admission of the state of Illinois on the condition that its constitution should conform to the compact in the Northwest Ordinance, which provided that the compact should relate to the states carved out of the territory, as well as to the then existing government, and was a further recognition of the protection which was always to be afforded to, and the sanctity which was always to be thrown around, the Indian ownership of lands in that section of the United States.

The enabling act which had been passed on April 18, 1818, pursuant to which the constitution of Illinois had been formed, and the provisions of which had been incorporated into the original constitution of Illinois, provided that the state should never interfere with the primary disposal of the soil by the United States, which was also in compliance with the Ordinance of 1787 (*U. S. Rev. Stat, p.* 15 *of Organic Laws*). When, therefore, the state of Illinois was organized and assumed jurisdiction over that portion of the Northwest Territory within the boundaries described in the enabling statutes and the state constitution, which could properly be incorporated into a state, *it acquired no title whatever to any lands situated within those boundaries to which the Indian title had not been extinguished*, as those lands belonged to the United States and the state by express provisions in its Constitution had waived all claim of ownership thereto, except as to the school lands specified in the enabling act.

DECISION IN ILLINOIS CENTRAL CASE NOT BINDING ON INDIANS.

28. The Supreme Court has decided that the moment the Indian title is extinguished that land passes into the public domain of the United States, and the question of what does or does not pass into the domain must, therefore, necessarily be decided by the proper officers of the United States. The records of the United States show that nothing east of the meander line or any townships bordering on Lake Michigan has ever been included in the public domain; but, on the contrary, as will be shown, the United States has, not by negative action, but by positively affirmative decisions, disclaimed the ownership of anything east of those lines. Only by establishing constructive claims to the effect that land under water next adjacent to land ceded by Indians passes to the State by operation of law and without any transfer by the United States, evidenced in any manner whatever can ever vest the State of Illinois with the ownership of any of the land the title to which is under consideration. The decision of the Supreme Court in the Illinois Central Railroad case (146 U. S. 698) to the effect that the United States holds land under water of the Great Lakes adjacent to the territories in trust to transfer it to the States when they pass from territorial governments into statehood, was made without regard to the Indian title, as no representatives of the Indians were before the Court; the opinion expressed the legal theory which possibly can be applied when the Indian title has been extinguished, but cannot apply, so far as the Northwest Territory is concerned, until after such extinguishment, for the unalterable compact of the Ordinance of 1787 would expressly exempt Indian property therefrom; in view of the Declaration of the Department of the Interior therefore, so far as any land is concerned which formed an island in Lake Michigan the decision has absolutely no application whatsoever, either as to the facts or as to the law.

TITLE TO ISLAND.

29. It has already been stated that after the original cession in the Greenville treaty of a plot six miles square at the mouth of the Chicago River, no survey was made by the United States although that treaty provided for conditions under which a survey could be made. The first survey of the cession made at St. Louis in 1816, conveying twenty miles frontage on Lake Michigan, was in 1819, after Illinois had become a State, when a surveyor by the name of John Sullivan laid the outside lines of the entire cession. In 1821 a regular contract in the usual form was made by the United States with the Rector brothers to survey and plat all of the lands belonging to public domain in Illinois, Missouri and Arkansas. They laid out a new meander line west of fractional township 39, range 14, on the shore of the lake, which was somewhat east (in some places 200 feet) of the line laid out by Sullivan in 1819. This meander was laid out by John Walls, a sub-contractor under the Rectors, in 1821; it has been adopted by the Department of the Interior of the United States as the meander line of Lake Michigan from a point ten miles north to a point ten miles south of the Chicago River, and ever since the closing of that line the Department has disclaimed the ownership of the United States to any land, whether upland on the shore of the lake, or land under the water of the lake, or islands in the lake. *All assumption of ownership, either by the state of Illinois, the city of Chicago or private owners has therefore been unwarranted, without any basis of law or title and in direct defiance of Indian ownership.* The Rector survey, as made by John Wall, is the first authentic survey showing anything beyond the outside lines made by Sullivan; on the official maps made by the War Department and based on those surveys a long island just outside the mouth of the Chicago River is plainly indicated, and a large part of the land the title to

which is now under consideration was included within the lines of that island; under no circumstances can any of that land be classed as land under water or forming a part of the bed of Lake Michigan, either at the present time, or at any time at or prior to or subsequent to the cession of 1816.

ENCROACHMENTS UPON INDIANS' TERRITORY.

30. While the documentary history of the land in question can be traced by reference to the instruments relating to it in the various departments of the Government and by acts of Congress and the State legislature and decisions of the courts, the actual history of the filling in of the property is one which can, to some extent be traced by the various maps of surveys which have been made from time to time by the Department of the Interior and by the War Department. These show that for the last eighty years encroachments have been steadily made upon land east of the meander line of 1821, filling up the bed of Lake Michigan and apparently carrying the line of the lake out to, and in some places beyond, the island referred to; at some points the new, or apparent, shore line is two thousand feet beyond the original east line of the island so that *encroachments have been made upon the Indians' territory three thousand feet and over between the Wall line of* 1821 *and the present line of filled in land.*

This has not been the result of natural accretion, which might possibly affect the original shore line, but has been entirely due to the deliberate acts of man, and by artificial means; the original or meander line, as established in 1821, has never been affected by natural accretion, and therefore the shore line, for purposes of legal adjudication of titles remains exactly as it was when ceded by the Indians in 1816, and as shown by the first official surveys of the United States made by John Sullivan in 1819, or as they were located and accepted by the United States when John Wall laid out the

meander line in 1821, which has ever since been recognized by the Government as the boundary of its purchase.

No Title Acquired as Against Indians.

31. It would be impracticable to recite, and review, the numerous acts which have been passed by the legislature of the State of Illinois affecting what is known as the Chicago lake front. Under some of those acts individuals and corporations claim that they have expended money and obtained vested rights. *All such expenditures, however, have been made with full knowledge of the existence of the Indian title, in regard to which there has never been any doubt or any dispute.* There has been no concealment of the record. The treaties are a matter of record, and *it is apparent to any one examining the record that the title to everything east of the meander line is necessarily either in the Indian tribes or in the United States.*

The principal acts upon which the claims rest are the Chicago Lake Front Act of 1869, which will be found in full in the report of the Illinois Central R. R. Co. case (146 U. S. 387). There are grave doubts as to the constitutionality of this act. The Attorney General of the State of Illinois contended before the Supreme Court that the act was unconstitutional. The Supreme Court did not so decide, but did decide that the sections involved in the controversy had been repealed and that no vested rights had been acquired thereunder by the Illinois Central R. R. Co. which the State could not terminate by repealing the act. This did not sustain the constitutionality of the act, but obviated the necessity of passing upon that point. Titles to large tracts of filled-in land on the Chicago lake front depend entirely upon the right of the Park Commissioners to sell to the present claimants for a nominal sum, pursuant to the provisions of the act of 1869. The plan adopted by the Park Commissioners and permitted by that act is as repugnant to the theory

of the Supreme Court as to the State ownership, if any, of the land under the water of Chicago harbor, as was the occupation thereof by the Illinois Central R. R. Co.; even if the Indian title has been extinguished, there are grave doubts as to whether the present claimants holding under the act of 1869 have acquired any rights whatsoever. *All of the acts of the legislature of the state of Illinois, as well as acts of Congress, in regard to the Chicago lake front have been in disregard of the Indian title;* all of the decisions of the courts of the United States, of the State of Illinois and of the Land Department have been made *ex-parte*, so far as the Indians are concerned, and while they have attempted to adjust conflicting claims of ownership as to the United States, States, corporations and individuals, those decisions are necessarily without any binding effect upon the Indians and those holding under them when they finally assert their claims.

It is unnecessary to go into the question of ownership of the city of Chicago, for that city holds under the State of Illinois, and its title must necessarily be limited by the same limitations which affect the title of the State. *The relations between the State and city are to some extent fixed by statute, but as against the Indians neither has any claim.*

Title Not Affected by Canal Grant.

32. In 1827 the United States, in order to encourage the building of a canal from Lake Michigan to the Illinois River, thus connecting Chicago with the Mississippi granted certain sections of land to the Canal Commissioners of the State. This act was necessary, as the State of Illinois had no land, and therefore had to apply to the United States for some of the land it had acquired from the Indians.

Under this act, however, the United States could have granted only sections of land the Indian title to which had been extinguished; the sections allotted were to be designated by the President and

none of the sections so designated contained any of the land the title to which is now under consideration; the canal subsidy act, therefore, cannot affect the title of any property east of the meander line as fixed by John Wall in 1821. What are known as the Swamp Lands Act of Congress, by which certain submerged lands were transferred to the States, do not apply to this case, as none of this land was *swamp* land, and the United States could not cede to the States any land the Indian title to which had not been extinguished. Furthermore, a large part of the land in question was not submerged land, but *as an island in Lake Michigan was land above water.*

LAND BEYOND SHORE LINE AS SURVEYED NOT CEDED BY INDIANS.

33. There is only one basis upon which the State of Illinois or any person holding under it can claim any of the lands east of the Wall meander line of 1821, and that is on the theory that when the Indians ceded, in 1816, a tract of land bounded by the shore of Lake Michigan that *ipso facto*, and as an appurtenant thereto, the land under water adjacent to the upland added for some distance—(exact extent unknown) passed by some process of law to the United States, and that when the United States subsequently admitted Illinois as one of the States of the Union on the same footing as the original thirteen states, that this ownership of, and sovereignty over, the land under water passed to the State in trust, as held in the Illinois Central case (146 U. S. 398), which has already been referred to.

In that respect it must be noted, first, that as the Indians were not before the Court, no claim of Indian ownership was considered, and, secondly, that this theory can only relate to land under water, and that if anything east of the Wall meander line of 1821, was above water that land did not, even under the theory of the Illinois Central R. R. case, pass to the State, but remained as United States

domain, exactly the same as the other land amounting to millions of acres the Indian title to which had been extinguished, remained in the United States. The decision of the Supreme Court in the Illinois Central R. R. Co. case does not seem to have considered the effect of the unalterable compact of the Ordinance of 1787, upon the question at all; in fact, the single point involved in the Illinois Central R. R. Co. case was whether the State of Illinois had a right to repeal the act of 1869, so as to deprive the Illinois Central R. R. Co. of the right of occupancy of those lands which had been filled in and occupied by it under the terms and conditions of the act of 1869. That is to say, the only point decided by the Supreme Court was that the lake front act of 1869 was not such a contract between the State and the Railroad Company that the State could not by a subsequent statute repeal it. To come back however, to the broad question of law, the State of Illinois acquired nothing east of the Wall line, except constructively on the theory that the land under water passed as an appurtenant with the cession of 1816. To refute this, as a proposition of law, would involve the preparation of a brief upon this single point. It must be sufficient in this abstract to state that the opinion of counsel preparing it, after examining the question, is that *the Indian grants are limited by the metes and bounds described in the cession, and that where land under water is conveyed it must be included in the boundaries, as was done in the cession of that part of Lake Huron which lies between the shore and the boundary between this country and Great Britain.* (*See Section* 11 *ante.*)

As to the riparian rights claimed by the owners of upland, in the absence of any Indian cession, they would of course not exist. The only rights which do, or can, claim are under and by virtue of the statutes of the State of Illinois, and the Supreme Court has decided that where the United States owned the land under water prior to the admission of Illinois as a State, those lands only

passed to the States "in trust for the people of the State."

The disposition of these lands under the State law of 1869 hardly seems to be in conformity with the duties of a trustee. Those rights, however, could not, under any circumstances, attach to that part of the land which, in 1821, formed an island, or which has been since then formed by accretions to the eastward side of that island, for that land would come under the rules of upland and real estate, and could not in any way be considered as subject to riparian rights, even if the general rule of riparian rights was sustained.

34. If the Pottawatamie Indians, or their successors, or their grantees should resume possession of the land in question, they could only be removed therefrom by the military forces of the United States, acting under military orders of the Executive, or by process of law through the intervention of the courts of the United States; they would be entitled to any adjudication made to the full benefit of all the provisions of the Ordinance of 1787, which, according to its own terms, is in as full force today as it was in 1787, for by its terms it was to remain unalterable forever.

In any action commenced in the courts the title of the parties instituting it would have to be proved beyond question before a judgment of ejectment could be entered. Unless an action was commenced by and on behalf of the United States, it would have to be instituted either by the State of Illinois or by some person claiming under it; and the action would fail unless a complete title was shown to have vested in the State and to have emanated properly from the State into the person maintaining the action.

If such an action were maintained by any corporation or individual holding title under the act of 1869, the constitutionality of that act would first have to be established before the title could be sustained.

(Signed) CHARLES HENRY BUTLER,
March 31, 1901. 71 Broadway.

APPENDIX B.

The Treaty of Greenville.

"TREATY WITH THE WYANDOT, ETC., 1795.

A treaty of peace between the United States of America and the Tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias.

To put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly intercourse between the said United States, and Indian tribes; Anthony Wayne, major-general, commanding the army of the United States, and sole commissioner for the good purposes above-mentioned, and the said tribes of Indians, by their Sachems, chiefs and warriors, met together at Greenville, the headquarters of the said army, have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the said Indian tribes.

ARTICLE I.

Henceforth all hostilities shall cease; peace is hereby established, and shall be perpetual; and a friendly intercourse shall take place, between the said United States and Indian tribes.

ARTICLE II.

All prisoners shall on both sides be restored. The Indians, prisoners to the United States, shall be immediately set at liberty. The people of the United States, still remaining prisoners among the Indians, shall be delivered up in ninety days from the date hereof, to the general or commanding officer at Greenville, Fort Wayne or Fort Defiance;

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and ten chiefs of the said tribes shall remain at Greenville as hostages, until the delivery of the prisoners shall be effected.

ARTICLE III.

The general boundary line between the lands of the United States, and the lands of the said Indian tribes, shall begin at the mouth of Cayahoga river, and run thence up the same to the portage between that and the Tuscarawas branch of the Muskingum; thence down that branch to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the great Miami river running into the Ohio, at or near which work stood Loromie's store, and where commences the portage between the Miami of the Ohio, and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; then southwesterly in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucky or Cuttawa river. And in consideration of the peace now established; of the goods formerly received from the United States; of those now to be delivered and of the yearly delivery of goods, now stipulated to be made hereafter, and to indemnify the United States for the injuries and expenses they have sustained during the war; the said Indian tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described; and these lands, on the part of them, shall never hereafter be made a cause or pretense, on the part of the said tribes or any of them, of war or injury to the United States, or any of the people thereof.

And for the same considerations, and as an evidence of the returning friendship of the said Indian tribes, of their confidence in the United States, and desire to provide for their accommodations, and for that convenient intercourse which will be beneficial to both parties, the said Indian tribes do also

cede to the United States the following pieces of land, to wit: (1) One piece of land six miles square at or near Loromie's store before mentioned. (2) One piece two miles square at the head of the navigable water or landing on the St. Mary's river, near Girty's town. (3) One piece six miles square at the head of the navigable water of the Au-Glaize river. (4) One piece six miles square at the confluence of the Au-Glaize and Miami rivers, where Fort Defiance now stands. (5) One piece six miles square at or near the confluence of the rivers St. Mary's and St. Joseph's, where Fort Wayne now stands, or near it. (6) One piece two miles square on the Wabash river at the end of the portage from the Miami of the lake, and about eight miles westward from Fort Wayne. (7) One piece six miles square at the Ouatanon or old Weea towns on the Wabash river. (8) One piece twelve miles square at the British fort on the Miami of the lake at the foot of the rapids. (9) One piece six miles square at the mouth of the said river where it empties into the Lake. (10) One piece six miles square upon Sandusky lake, where a fort formerly stood. (11) One piece two miles square at the lower rapids of Sandusky river. (12) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of lake Erie, and Detroit river. (13) The post of Michillimackimac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on Lake Huron, or the strait between lakes Huron and Michigan, and to extend three miles back from the water

of the lake or strait, and also the island DeBois Blanc, being an extra and voluntary gift of the Chippewa nation. (14) One piece of land six miles square at the mouth of Chikago river, emptying into the southwest end of Lake Michigan, where a fort formerly stood. (15) One piece twelve miles square at or near the mouth of the Illinois river, emptying into the Mississippi. (16) One piece six miles square at the old Piorias fort and village near the south end of the Illinois lake on said Illinois river: And whenever the United States shall think proper to survey and mark the boundaries of the lands, hereby ceded to them, they shall give timely notice thereof to the said tribes of Indians, that they may appoint some of their wise chiefs to attend and see that the lines are run according to the terms of this treaty.

And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through their country, along the chain of posts herein before mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store, thence along said portage to the St. Mary's and down the same to Fort Wayne, and then down the Miami to Lake Erie; again from the commencement of the portage at or near Loromie's store along the portage from thence to the river Au-Glaize, and down the same to its junction with the Miami at Fort Defiance; again from the commencement of the portage aforesaid, to Sandusky river, and down the same to Sandusky hat and lake Erie, and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami of the lake; and from thence to Detroit. Again from the mouth of Chicago, to the commencement of the portage, between that river and the Illinoise, and down the Illinois river to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the

free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE IV.

In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United States, the tracts of land, are explicitly excepted. 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article; and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they or any of them may have.

And for the same considerations and with the same views as above mentioned, the United States now deliver to the said Indian tribes a quantity of goods to the value of twenty thousand dollars, the receipt whereof they do hereby acknowledge; and henceforward every year forever the United States

will deliver at some convenient place northward of the river Ohio, like useful goods, suited to the circumstances of the Indians, of the value of nine thousand five hundred dollars; reckoning that value at the first cost of the goods in the city or place in the United States, where they shall be procured. The tribes to which those goods are to be annually delivered, and the proportions in which they are to be delivered, are the following:

1st. To the Wyandots, the amount of one thousand dollars. 2d. To the Delawares, the amount of one thousand dollars. 3d. To the Shawanese, the amount of one thousand dollars. 4th. To the Liamis, the amount of one thousand dollars. 5th. To the Ottawas, the amount of one thousand dollars. 6th. To the Chippewas, the amount of one thousand dollars. 7th. To the Putawatimes, the amount of one thousand dollars. 8th. And to the Kickapoo, Weea, Eel-river, Piankashaw and Kaskaskias tribes, the amount of five hundred dollars each.

Provided, That if either of the said tribes shall hereafter at an annual delivery of their share of the goods aforesaid, desire that a part of their annuity should be furnished in domestic animals, implements of husbandry, and other utensils convenient for them, and in compensation to useful artificers who may reside with or near them, and be employed for their benefit, the same shall at the subsequent annual deliveries be furnished accordingly.

ARTICLE V.

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those

tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

ARTICLE VI.

If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein before stipulated.

ARTICLE VII.

The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.

ARTICLE VIII.

Trade shall be opened with the said Indian tribes; and they do hereby respectively engage to afford protection to such persons, with their property, as

shall be duly licensed to reside among them for the purpose of trade, and to their agents and servants; but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendent of the department northwest of the Ohio, or such other person as the President of the United States shall Authorize to grant such licenses; to the end, that the said Indians may not be imposed on in their trade. And if any licensed trader shall abuse his privilege by unfair dealing, upon complaint and proof thereof, his license shall be taken from him, and he shall be further punished according to the laws of the United States. And if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendent or his deputy, to be dealt with according to law. And to prevent impositions by forged licenses, the said Indians shall at least once a year give information to the superintendent or his deputies, of the names of the traders residing among them.

ARTICLE IX.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States, and the said Indian tribes agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but instead thereof, complaint shall be made by the party injured, to the other; by the said Indian tribes, or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent or other person appointed by the President, to the principal chiefs of the said Indian tribes, or of the tribe to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve the said peace and friendship unbroken, until the Legislature (or Great Council) of the

United States, shall make other equitable provision in the case, to the satisfaction of both parties. Should any Indian tribes meditate a war against the United States or either of them, and the same shall come to the knowledge of the before-mentioned tribes, or either of them, they do hereby engage to give immediate notice thereof to the general or officer commanding the troops of the United States, at the nearest post. And should any tribe, with hostile intentions against the United States, or either of them, attempt to pass through their country, they will endeavor to prevent the same, and in like manner give information of such attempt, to the general or officer commanding, as soon as possible, that all causes and suspicion may be avoided between them and the United States. In like manner the United States shall give notice to the said Indian tribes of any harm that may be meditated against them, or either of them, that shall come to their knowledge; and do all in their power to hinder and prevent the same, that the friendship between them may be uninterrupted.

ARTICLE X.

All other treaties heretofore made between the United States and the said Indian tribes, or any of them, since the treaty of 1783, between the United States and Great Britain, that come within the purview of this treaty, shall henceforth cease and become void.

In testimony whereof, the said Anthony Wayne, and the sachems and war chiefs of the before-mentioned nations and tribes of Indians, have hereunto set their hands and affixed their seals.

Done at Greenville, in the territory of the United States northwest of the river Ohio, on the third day of August, one thousand seven hundred and ninety-five.

* * * * * *"

APPENDIX C.

Illinois Statutes in Question.

The ordinance of the City of Chicago providing for the building of a harbor is set up in full as an exhibit and attached to the original bill of complaint and appears on pages 12 to 19 of the Transcript of the Record. The several statutes named in the bill purport to dispose of or authorize the disposition of certain of the submerged or formerly submerged lands of Lake Michigan and so far as pertaining to this case are as follows:

LINCOLN PARK—TITLE TO SUBMERGED LANDS.

"An Act to grant the title of certain submerged land in Lake Michigan to the Commissioners of Lincoln Park and enable them to exercise police power over the water adjacent thereto. Approved June 4, 1889. In force July 1, 1889. L. 1889, p. 214; Legal News Ed., p. 133.

Title to Submerged Land, Etc. Sec. 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY, That all right, title and interest of the State in and to the bed of Lake Michigan on which the driveway connected with Lincoln Park is now constructed, or on which any extension thereof may hereafter be constructed, and a strip of such submerged land between the east line thereof, and a line fifty feet east of the breakwater, protecting said driveway and any extension of the same be and is hereby granted to the Commissioners of Lincoln Park and their successors in office, to be held for the use and benefit of the public as a part of said park and for no other purpose whatever.

Police Control Over. Sec. 2. That said commissioners may have and exercise police control over the waters of Lake Michigan along the east side of said driveway and any extension thereof, for a dis-

tance of two hundred and fifty feet in same way as over the grounds of the park, and sand may be taken therefrom by permission of said commissioners."

EXTENSION OF BOULEVARD OR DRIVEWAY.

"An Act to enable Park Commissioners having control of any Boulevard or driveway bordering upon any public waters in this State, to extent the same. Approved June 4, 1889. In force July 1, 1889, p. 212; Legal News Ed. p. 134.

Extension of Boulevard or Driveway not to interfere with navigation. Sec. 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN GENERAL ASSEMBLY, That every board of park commissioners, existing under the laws of this State, that now has, or may hereafter have, control over any boulevard or driveway connecting with any public park under the control of such board, and bordering upon any public waters in this State, shall have power, subject to the limitations in this act contained, to extend such boulevard or driveway, of the width of not more than two hundred feet over and upon the bed of such public waters: Provided, however, that no such boulevard or driveway shall be extended under the provisions of this act in such a manner as to interfere with the navigation of such public waters for the purposes of commerce; and that the lands adjacent to such public waters and connected with the termini of such boulevard or driveway as extended under the provisions of this act, shall lie within the District or territory, the property of which shall be taxable for the maintenance of the parks under the control of such board.

Extension—Plans—Consent of Corporate authorities—Riparian Rights. Sec. 2. Whenever any such board of park commissioners shall determine to extend any such boulevard or driveway under this act, said board shall prepare a plan of such proposed extension, and make an estimate of the cost thereof, and shall obtain the consent in

writing of the owners of at least two-thirds of the frontage of all of the lands not appropriated to or held for public use abutting on such public waters, in front of which it is proposed to extent such boulevard or driveway, for the making of such extension, and shall also obtain the consent of the supervisor and assessor corporate authorities of the town or towns in which the lands abutting on such public waters in front of such proposed extension may lie, to the making of such extension. The riparian or other rights of the owners of lands on the shore adjoining the waters in which it is proposed to construct such extension, the said board of park commissioners may acquire by contract with or deeds from any such owner; and in case of inability to agree with any such owner, proceedings may be had to condemn such rights according to the provisions of article nine of an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and the amendments thereof.

Powers of Board—Submerged Lands. Sec. 3. Upon complying with section two of this act, said board shall have power to contract in writing with any person or persons for the construction of such extension of such boulevard or driveway, according to such plan, and under the supervision of said boards, and in all cases where any boulevard or driveway is extended under the provisions hereof the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple by deeds duly executed on its behalf by its President and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby.

Completion of Extension—Title in Submerged Lands. Sec. 4. Upon the completion of any such extension of such boulevard or driveway the title thereto, and to the bed thereof, shall be vested in such board of park commissioners for the purpose of a boulevard or driveway, and shall become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law for the government and maintenance of other boulevards and driveways under its control.

When Street Extends to Shore. Sec. 5. In case any public streets shall extend to the shore line of said public waters in front of which extension of such boulevard or driveway shall be constructed under this act, and such streets, if extended, would cross such extension, such streets (unless the municipality in control thereof shall otherwise direct) shall extend to the inside line of such extension of said boulevard or driveway. Nothing in this act shall be construed to repeal section twenty of an act entitled "An Act in regard to the completion of public parks and the management thereof," approved June 16, 1871, and amendments thereto heretofore made, or which may be hereafter made, unless expressly so declared.

N. B. There is nothing in the Act of June 16, 1871, last referred to, which appears to have any pertinency to this case.

For the Enlargement of Lincoln Park.

"An Act for the enlargement of Lincoln Park and to defray the expense thereof, Approved June 17, 1893. In force July 1, 1893. L. 1893, p. 159; Legal News Ed., p. 108.

Whereas, the health and the best interests of the public require that Lincoln Park in Chicago, be enlarged, therefore, 99. Enlargement of Parks—Commissioners to fix boundaries.) Sec. 1. Be it enacted, by the People of the State of Illinois, rep-

resented in the General Assembly, That in all cases where lands within specified boundaries have been declared to be a public park, for the enlargement of a public park, and provisions made for requiring the title to the land embraced within said boundary by purchase or condemnation, it shall be lawful to enlarge the boundaries thereof and to acquire to lands and riparian rights by purchase or condemnation embraced in said enlarged limits.

The commissioners of any such park may determine and fix the boundaries of such addition or enlargement, cause a survey and plat thereof to be made and adopt the same by resolution of the board of park commissioners having the management of such park. After the boundaries thereof shall be so established the said board of commissioners of such park may purchase any land and riparian rights, if any, at fair and reasonable prices, to be determined by agreement, with the owners thereof; and, in case of an inability to agree with such owners or any of them, as to the price and prices, that shall be lawful to condemn the same, according to the provisions of article nine of chapter twenty-four of the Revised Statutes and any amendments thereto; for the purpose of raising the money to pay for such property, whether fixed by agreement with the owners or by the judgment of the court, it shall be lawful to make an assessment upon the property benefited by the proposed improvement, in the manner provided in article nine of chapter twenty-four of the Revised Statutes and amendments thereto.

Lawful to Construct Breakwater.) Sec. 2. It shall be lawful for any board of commissioners of such park to establish, construct and maintain breakwater, as against waste from any lake or any public water, which in their judgment may be necessary to protect the land and property of said park and also to construct and maintain any driveway or boulevard in connection with such park, and when necessary to acquire land or riparian rights for that purpose, and to proceed in the manner

hereinbefore specified for the acquirement of land and riparian rights to be embraced within the enlarged limits of such park.

Consent of Supervisor and Assessor Required.) Sec. 3. Before it shall be lawful for any board of commissioners of such park to proceed, hereinbefore specified to enlarge a park or to make or to cause to be made, an assessment for the purpose of making compensation for the lands and riparian rights, the consent of the supervisor and assessor of the town in which such park or any part thereof may be located, and in which it is proposed to make said improvement shall be procured by them, and for that purpose the supervisor and assessor are hereby declared to be corporate authorities of said town."

Commissioners Having Control of Park Bordering Upon Waters to Enlarge the Same—Granting Submerged Lands for the Purpose of Such Enlargements.

"An Act to enable park commissioners having control of any park bordering upon public waters in this State to enlarge the same from time to time and granting submerged lands for the purpose of such enlargements and to defray the cost thereof. (Approved June 15, 1895. In force July 1, 1895. L. 1895, p. 282; Legal News Ed., p. 193.

Power over Submerged Lands—Plans—Title to such Lands.) Sec. 1. Be it Enacted by the People of the State of Illinois, represented in the General Assembly, That in all cases where lands within specified boundaries bordering on public waters in this State have been declared to be a public park, and where the commissioners of such park have been named in the act establishing the same, and their successors have since been appointed by the Governor of this State, the said commissioners of any such park shall have power from time to time in their discretion to enlarge the same by reclaiming submerged lands under said public waters in the following manner: Said board of commission-

ers upon deciding to make any such enlargement of said park shall prepare and adopt a plan of such enlargement and in the same shall locate a boulevard or driveway over and upon the bed of such public waters. The termini of such boulevard or driveway shall be within the district or territory the property of which shall be taxable for the maintenance of the park under the control of said board, and one at least of such termini shall be at or upon some driveway or boulevard already established and under the control of said board of commissioners. The said proposed boulevard or driveway shall be so located as not to interfere with the navigation of such public waters for the purposes of commerce. Said plan shall provide for such breakwater, seawall or other protection upon the water line of said boulevard or driveway as shall be necessary to save the same from destruction or waste by water.

Said plan shall also locate upon the submerged lands between the shore line of such public waters as it exists at the time said plan is prepared and adopted and the inner line of the proposed boulevard and driveway, such portions of the submerged lands to hold, use and improve for the purposes of a public park under its control and management. Said board of commissioners after the preparation and adoption of said plan shall make an estimate of the cost of the construction of said boulevard and driveway and the filling in and reclamation of all the submerged lands lying between the inner line of said boulevard and the shore line of such public waters. Thereupon the title of such submerged lands over which the said boulevard or driveway is located and of the said submerged lands between said boulevard as located and the shore line shall become and be vested in and is hereby granted to the said board of commissioners, in fee simple for park purposes, as hereafter in this act set forth.

Riparian Rights—Condemnation—Bill by owners to define boundary line.) Sec. 2. The riparian rights of the owners of lands along the shore ad-

joining such submerged land, and such land along the said shore as to the said board shall seem necessary and desirable, the said board of commissioners may acquire by contract with or deeds from any such owner, and in case of inability to agree with any such owner proceedings may be had to condemn such rights and such lands according to the provisions of Article 9 of an act entitled, 'An Act to provide for the incorporation of cities and villages,' (approved April 10, 1872), and the amendments thereof.

In all cases in which said board of park commissioners shall have acquired or contracted to acquire the riparian rights of the owners of any land along the shore adjoining such submerged land, the owners of such shore land may file a petition or bill in chancery on the chancery side of the circuit court of the county in which said lands are situated, to which bill or petition the said board of park commissioners shall be made defendants, praying that the boundary line between the lands of the petitioners or complainants in said suit and the lands acquired by the said board of park commissioners under this act may be established and defined by the decree of said circuit court. The defendant shall be served with process in the suit so instituted in the same manner as in suits in chancery, and the proceedings in said cause may be conducted in the same manner as in other suits in chancery, and the court shall have power by its final decree in said cause to establish the dividing or boundary line between the lands of the petitioners or complainants and the lands of the said board of park commissioners adjacent thereto, and the line so established by the decree or judgment of the said circuit court shall be the permanent boundary line of said shore lands which shall not be affected or changed thereafter, either by accretions or erosions, and the owners of said shore lands shall have the right to improve, protect, sell and convey the shore lands up to the boundary line so established, free from any adverse claim in any way arising out

of any question as to where the shore line was at any time in the past or as to the title to existing accretions, if any, to said shore land. And in the event that any owner or party interested in any of the said shore lands shall be unable to contract with said park commissioners by reason of a minority or other disability, a petition or bill in chancery may be filed by the guardian or next friend of such owner on the chancery side of the circuit court in the county in which such lands are situated, to which the said board of park commissioners shall be made defendants, praying that such proceedings may be had and such order or decree entered as may be necessary or proper to protect the interests of the said petitioner or complainant in said shore lands. The defendants shall be served with process in the same manner as in suits of chancery and the proceedings in said cause shall be conducted in the same manner as in other suits in chancery, and the court shall have power by its final decree, upon such terms and conditions as it may deem reasonable and fair, to transfer to said board of park commissioners all the riparian rights of the petitioner or complainant, and also to establish the boundary line between the lands owned by the petitioner or complainants, and the lands of said board of commissioners. (As amended by act approved May 14, 1903. In force July 1, 1903. L. 1903, p. 260; Legal News Ed., p. 210.)

Submerged Lands—Uses for which held.) Sec. 3. The submerged lands thus granted and the shore lands together with the riparian rights thus acquired in accordance with the preceding sections, the said commissioners shall hold for the following uses:

First—For the purpose of constructing and maintaining the boulevard or driveway as in said plan located.

Second—For the purpose of filling, reclaiming, improving, maintaining and holding such portions as are so designated upon said plan, as a public park.'

FOR THE ORGANIZATION OF PARK DISTRICTS AND THE TRANSFER OF SUBMERGED LANDS, ETC.

"An act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water. (Approved June 24, 1895. In force July 1, 1895. L. 1895, p. 272; Legal News Ed. * * *

When park district borders upon navigable water, etc.—Power of Board as to submerged land, etc.) Sec. 16. When any park district created under this act borders upon any navigable body of water, the title to the bed or submerged land of which is vested in the State of Illinois, said district may take possession of, inclose, fill in, reclaim and protect any portion of such submerged land bordering thereon, over which there shall be shoal and shallow water not fit for navigation and shall have the power to establish, construct and maintain parks and boulevards over and upon the same, and all right, title and interest of the State of Illinois in and to the bed or submerged land of such body of water, so taken possession of, enclosed, filled in and reclaimed is hereby granted and ceded to such park district and the title thereto shall vest in such park district to be held for the use and benefit of the public as a part of said park district for park and boulevard purposes exclusively, and said district shall have power for the purpose of reclaiming such submerged land and protecting the same thereafter to construct all necessary break-waters, or protection for the building and maintenance of such parks and boulevards, and the enclosing or reclamation of such submerged lands.

Any such sumberged lands so enclosed and reclaimed as aforesaid shall forever be held and maintained for park and boulevard purposes and no portion thereof shall ever be granted or ceded away by any district for any purpose, and in case the same should ever cease to be used for park or boulevard purposes, then the title to the same shall revest in

the State of Illinois, together with all the improvements thereon and the appurtenances thereof. * * *."

LAKE FRONT CHANGED TO GRANT PARK.

"An Act to convey and designating certain submerged lands known as 'lake front' for park purposes. (Approved April 24, 1899. In force July 1, 1899, L. 1899, p. 328; Legal News Ed., p. 242.)

Whereas, Many Grand Army posts, members of the Grand Army, civic organizations and clubs, and citizens of the city of Chicago, and State of Illinois, have petitioned the General Assembly to name and designate by act, the park which is making and about to be made upon the lake front in the city of Chicago; and

Whereas, The title to the land in Chicago, commonly known and designated as the 'lake front,' lying along the lake shore, and extending south of Randolph street, north of Park Row, and East of Michigan avenue, and a part of which is yet submerged under the waters of Lake Michigan, but the reclamation of which is contemplated and being now undertaken by the filling in from the present shore line hereafter, is still, we believe, in the State of Illinois; and

Whereas, The City of Chicago, by the action of the city council, has formally transferred the possession, care, improvement and management of said 'lake front,' to what is known as the 'Board of South Park Commisioners,' for the express purpose of establishing a public park and pleasure ground thereon, but the title to which not being vested in said 'Board of South Park Commissioners' said board is prevented and delayed from carrying out and perfecting the plans necessary for the proper development and improvement of a public park in said 'lake front,' and in discharging all their obligations and duties in that behalf, as contemplated and planned by said 'Board of South Park Commissioners'; and

Whereas, There are now in the city of Chicago a number of public parks and squares named respectively after such illustrious statesment, heroes and scientists as Washington, Lincoln, Jackson, Jefferson, Sheridan, Garfield, Douglas, Logan, Dearborn and Humboldt but not one named after the great silent soldier of Illinois, U. S. Grant; therefore

Boundaries defined and conveyed to South Park Commissioners.) Sec. 1. That the land or lands located in the city of Chicago, county of Cook, and State of Illinois, bounded on the north by the north line of Monroe Street, produced east to the outer sea wall or harbor line, established by the secretary of war, September 22, 1890, in Lake Michigan, and bounded on the east by said outer sea wall or harbor line, and bounded on the south by the south line of the street known as Lake Park Place (formerly known as Park Row), produced east to said outer sea wall or harbor line, and bounded on the west by the east line of Michigan avenue, which land is commonly known and designated as the 'lake front,' including all submerged land lying west of said outer sea wall or harbor line, and between said north and south boundary lines above described shall be, and are hereafter to be called, designated and known as 'Grant Park,' and said 'Grant Park,' is hereby conveyed to the south park commissioners, to be held, managed, and controlled by said commissioners, as other parks are now under their control; except, however, that portion of said 'Grant Park,' lying north of the north *of the north,* line of Jackson Street, extended east from Michigan avenue to the said outer sea wall or harbor line, and except also the right of way, easements, and grounds of the Illinois Central Railroad Company, extending north and south through said 'Grant Park,' as described in an ordinance of the city council of the city of Chicago, passed October 21, 1895, and published by authority of the city council in 1898, in Volume two (2), of Special Ordinances of Chicago, at page 657. (As amended by act approved May 10, 1901. In force July 1, 1901. L. 1901, p. 260; Legal News Ed., p. 207.

TO ENLARGE AND CONNECT PARKS BORDERING ON PUBLIC WATERS BY EXTENSIONS OVER LANDS AND BEDS OF THE WATERS.

Power to extend or connect park or driveway over bed of waters—May acquire riparian or other rights—eminent domain.) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That every board of park commissioners existing under the laws of this State, which has now, or may hereafter have, or acquire, control over any public park, boulevard or driveway, bordering upon any public waters in this State, shall have the power to extend such park, boulevard or driveway over and upon the bed of such public waters, and that every board of park commissioners existing under the laws of this state, which now has, or may hereafter have or acquire, control over two or more separate public parks, whether they constitute a part of one park system or not, bordering upon any public waters in this State, shall have power to connect the same by constructing a park, boulevard, driveway or parkway, extending over and upon the submerged land and bed of such public waters, and over and upon any lands adjacent to or adjoining upon or penetrating into such waters, and may extend any such park by constructing a park, boulevard, driveway or parkway over any private property, and over any navigable river or any part thereof which lies within the territory, the property of which shall be taxable for the maintenance of the park under the control of said board of park commissioners, so as to connect such park, boulevard, driveway, or parkway with any park, boulevard, driveway or parkway now or hereafter constructed, and connected with or forming a part of any other park system; and in extending such park or in constructing such park, boulevard, driveway or parkway, the said board of park commissioners may construct such viaducts, bridges or tunnels, or parts of viaducts, bridges or tunnels, within its said territory as to it may seem necessary, and that every such

board of park commissioners may acquire the lands, or the riparian or other rights of the owners of lands, or both, whether of individuals or corporations, on the shores adjacent to or adjoining the public waters or rivers in which it is proposed to construct any such park, boulevard, driveway or parkway, or extension or connection, also the title of the private or public owners, if any there be, to lands lying beneath, adjacent to or adjoining such public waters or rivers, also the title of any lands penetrating into such public waters and the title of any lands into, upon or over which it is proposed to construct any such park, boulevard, driveway or parkway or any such extension or connection, or any viaduct, bridge or tunnel forming a part thereof, by contract with or deed from any such owner or owners, whether individuals or corporation, or by condemnation; Provided, however, that no extension which shall be made shall interfere with the practical navigation of such public waters or rivers for the purposes of commerce, without due authority from the proper official of the United States government having control thereof. Said board of park commissioners and said riparian or adjacent owners are hereby authorized to agree upon a boundary line dividing such adjacent, adjoining, submerged and penetrating lands, acquired or to be acquired by said board of park commissioners, and such adjacent, adjoining, submerged and penetrating lands to be taken, owned and used by said riparian or other owners in lieu of and as compensation for the release of said lands and riparian rights to said board of park commissioners. In case said board of park commissioners are unable to agree with and (any) such owner or owners or persons interest, either as to such boundary or dividing line and such lands to be taken by such riparian or other owners and persons interested as compensation for the release and granting of said lands and riparian or other rights or in case the compensation to be paid for or in respect of the property, riparian or other rights, the adjacent, adjoining, submerged and penetrating or other lands sought to be appropriated or damaged for the pur-

poses mentioned in this act, cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a non-resident of the State, or, if in any event, the said board of park commissioners shall elect to acquire the riparian or other rights, or the adjacent, adjoining, submerged and penetrating or other lands, or any such rights or lands, proceedings may be had to condemn the said riparian or other rights and the said adjacent, adjoining, submerged and penetrating or other lands, or any of them, according to the provisions of an act entitled, 'An Act to provide for the exercise of the right of eminent domain,' approved April 10, 1872, in force July 1, 1872, and amendments thereto. * * *

Title vested in Board.) Sec. 4. The title to any such extension or connection of such park or parks, boulevards, driveways and parkways, and to the bed thereof shall be, and hereby becomes vested in such board of park commissioners for public purposes, and the same shall thereby become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law, for the government and maintenance of other parks, boulevards and driveways under its control, and in all cases where any boulevard, driveway or parkway is extended, or constructed, under the provisions of this act, the title to the submerged lands lying between the shore of such public waters, and the inner line of the extension of such boulevard, driveway or parkway, shall be, and thereby becomes vested in such board of park commissioners for public purposes; and in case any such park, boulevard, driveway or parkway, extension or connection as provided in this act, shall be made into, over or upon the bed of Lake Michigan by any such board of park commissioners, then the right, title and interest of the State of Illinois in and to the bed of so much of said Lake Michigan shall be vested in such board of park commissioners as in other cases provided in this act,

and for the same purposes and with the same rights and power."

CONVEYING LAKE FRONT AND SUBMERGED LANDS TO SOUTH PARK COMMISSIONERS FOR PARK PURPOSES.

"An Act conveying certain lands to the South Park Commissioners for the purpose of establishing a Public Park or Pleasure Ground thereon. (Approved and in force May 14, 1903. L. 1903, p. 268; Legal News Ed., p. 216.)

241. Conveyance of Lake Front Land to South Park Commissioners.) Sec. 1. Be it Enacted by the People of the State of Illinois represented in the General Assembly: That the land, including all submerged land, known as Grand Park, in the City of Chicago, County of Cook and State of Illinois, bounded on the north by the south line of Randolph street extended in a straight line east from Michigan avenue to the harbor line established by the Secretary of War in Lake Michigan, and bounded on the east by said harbor line, and bounded on the south, east of the right of way, easement and grounds of the Illinois Central Railroad Company, by the south line of the street known as Lake Park place (formerly known as Park Row) extended in a straight line east from Michigan avenue to said harbor line, and west of said right of way, easement and grounds by the north line of said Lake Park place, and bounded on the west by the east line of Michigan avenue, excepting, however, the right of way, easement and grounds of the Illinois Central Railroad Company extending north and south through said Grant Park as described in an ordinance of the city council of the City of Chicago, passed October 21, 1895, and published by authority of said council in 1898 in volume 2 of Special Ordinances of the City of Chicago, at page 657, be and the same is hereby conveyed to the South Park Commissioners, to be held, managed and controlled by said commissioners as other parks now are under the control of said Commissioners."

Conveying Certain Lands to South Park Commissioners.

"An Act conveying certain lands to the South Park Commissioners for the purpose of establishing public parks and pleasure grounds thereon. (Approved May 14, 1903. In force July 1, 1903. L. 1903, p. 268; Legal News Ed., p. 218.

Certain Lands Conveyed to South Park Commissioners.) Sec. 1. Be it enacted by the People of the State of Illinois represented in the General Assembly: That the land including all submerged and artificially made lands lying within the south boun dary line of Jackson Park and the south line of Seventy-ninth street as extended one thousand feet into Lake Michigan and a line easterly of and parallel with the shore line of said lake and the shore line of such lake, and also the land including all submerged and artificialy made land lying within the north line of Ninety-fifth street extended to its intersection with the boundary line of Indiana and Illinois as extended and the shore line of Lake Michigan, all of such lines being situated in the City of Chicago, County of Cook, and the State of Illinois, be, and the same are hereby granted and conveyed to the Board of South Park Commissioners and their successors in office, to be held, managed and controlled by them for the same uses and purposes as other parks now under their control."

MAPS

TOO

LARGE

FOR

FILMING

FILED
DEC 11 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 128

JOHN WILLIAMS, Chief *et al.*,
Appellants,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILWAY COMPANY *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

Some Suggestions on Behalf of Appellee, City of Chicago.

SAMUEL A. ETTELSON,
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Solicitors for the Appellee,
City of Chicago.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 128

JOHN WILLIAMS, Chief *et al.*,
Appellants,

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The interests of the appellees are in common as against the appellant, Indians. No question of the rights of appellees among themselves is presented. Therefore, the appellee, City of Chicago, adopts as and for its own the very able and exhaustive "brief and argument for Illinois Central R. R. Co., South Park Commissioners, Commissioners of Lincoln Park, Illinois Steel Co., C. C. C. & St. L. Ry. Co., Michigan Central R. R. Co., and M. St. P. & S. Ste.

M. Ry. Co.," for the purposes of this case; it being understood that nothing therein contained or hereinafter set forth shall be considered as applicable to any present or future controversy which the appellee, City of Chicago, may have with the other appellees.

In addition to the matters set forth in the brief above adopted, we desire to call attention to a few things which seem to us to be especially applicable to the case of this appellee.

The general proposition which we desire to emphasize and to which what follows seems to us to be pertinent, is this:

The fact that for practically a century the United States and under it the State of Illinois and its municipalities and private owners have been openly and notoriously asserting sovereignty and ownership and acting with respect to these lands in a manner utterly inconsistent with the construction now sought to be put upon ancient documents and treaties coupled with the further fact that the entire world, including these appellant Indians and their ancestors have acquiesced during all this long time, in such assertions and actions, is the very best evidence that such ancient documents and treaties are not susceptible of the construction now sought to be put upon them.

In 13 Cyc. at pages 608 and 609 it is said:

> "So where all the parties have acted upon a particular construction, such construction should be allowed unless it is forbidden by some positive rule of law."

This appellee, the City of Chicago, is a municipal corporation under the laws of the State of Illinois. For forty years prior to 1863 it had existed as a municipal corporation of one kind or another. In 1837 it was incorporated as a city. It would serve no useful purpose to trace its early history.

In 1863 the State of Illinois, by a statute enacted (see Illinois Laws of 1863) reduced the charter of the city to one law, and by section 2 thereof prescribed its boundaries as follows:

> "The corporate limits and jurisdiction of the City of Chicago shall embrace and include, within the same, all of township thirty-nine north, range fourteen east of the third principal meridian, and all of sections thirty-one, thirty-two, thirty-three and fractional section thirty-four, in township forty, north, range fourteen east of the third principal meridian, *together with so much of the waters and bed of Lake Michigan as lies within one mile of the shore thereof and east of the territory aforesaid.*"

Since that time—and, indeed, for a long time before—the City of Chicago has exercised its jurisdiction as a local government over the territory described in the statute above quoted. This territory includes a large part of the lands claimed by the appellants.

As we will hereinafter more fully point out, the City of Chicago in its private or proprietary capacity also owns certain of these lands. This appears from the bill of complaint.

Thus, more than half a century before the bill of complaint herein was filed, the State of Illinois, by this public statute, openly and notoriously asserted

and exercised ownership and jurisdiction over the lands in question, and neither the appellants nor any predecessor in their supposed title during such half century questioned the title of the State of Illinois.

In 1818 (3 U. S. Statutes at Large, 428)—ninety-six years before the bill of complaint herein was filed—the Congress of the United States adopted an act entitled, "An Act to enable the People of Illinois to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the Original States"; sections 1 and 2 of which act being as follows:

> "§1. BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the inhabitants of the territory of Illinois be and they are hereby authorized to form for themselves a Constitution and State government; and to assume such name as they shall deem proper; and the said State, when formed, shall be admitted into the Union upon the same footing with the original States, in all respects whatever.
>
> "§2. AND BE IT FURTHER ENACTED, That the said State shall consist of all the territory included within the following boundaries, to wit: Beginning at the mouth of the Wabash river; thence, up the same, and with the line of Indiana, to the northwest corner of said State; THENCE, EAST WITH THE LINE OF THE SAME STATE, TO THE MIDDLE OF LAKE MICHIGAN; THENCE, NORTH ALONG THE MIDDLE OF SAID LAKE, TO NORTH LATITUDE 42 deg. 30 min.; thence, west to the middle of the Mississippi river; and thence, down along the middle of that river, to its confluence with the Ohio river; and thence, up the latter river, along its northwestern shore, to the beginning: PROVIDED, that the convention hereinafter provided for, when formed, shall ratify the boundaries aforesaid; otherwise they shall be and re-

main as now prescribed by the Ordinance for the Government of the territory northwest of the river Ohio: PROVIDED, ALSO, that the said State shall have concurrent jurisdiction with the State of Indiana on the Wabash river, so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river, with any State or States to be formed west thereof, so far as said river shall form a common boundary to both."

1 Jones & Addington's Illinois Statutes Annotated, page 60.

On August 26, 1818, the Constitutional Convention of the State of Illinois accepted the foregoing Enabling Act (Laws 1819, App., p. 21) and on the same day they adopted their first constitution (Laws 1819, App., p. 1), which contains the following:

"The people of the Illinois Territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the law of Congress approved April 18, 1818, entitled 'An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes;' in order to establish justice, promote the welfare, and secure the blessings of liberty to themselves and their posterity, do, by their Representatives in convention, ordain and establish the following Constitution or form of government, and do mutually agree with each other to form themselves into a free and independent State, by the name of the State of Illinois. And they do hereby ratify the boundaries assigned to such State by the Act of Congress aforesaid, which are as follows, to wit: Beginning at the mouth of the Wabash

river, thence up the same, and with the line of Indiana, to the northwest corner of said State; THENCE EAST WITH THE LINE OF THE SAME STATE, TO THE MIDDLE OF LAKE MICHIGAN; THENCE NORTH, ALONG THE MIDDLE OF SAID LAKE, TO NORTH LATITUDE 42 deg. AND 30 min.; thence west to the middle of the Mississippi river, and thence down, along the middle of that river, to its confluence with the Ohio river; and thence up the latter river, along its northwestern shore, to the beginning."

1 Jones & Addington's Statutes, pages 63, 67.

Thus, at that early date, the Government of the United States understood that it had the right to and did convey to the State of Illinois the west half of Lake Michigan, between the parallels of latitude mentioned, which includes all the lands claimed by the bill of complaint herein.

The acts of the United States and of the State of Illinois, to which we have above called attention, were public acts of the highest solemnity. They could not be attacked, if they were recent; and certainly they are not open to question for the first time almost a century after they occurred.

As appears from paragraph 3 of the bill (transcript, page 2), the appellants assert ownership, possession and occupancy in the Pottawatomie Nation of Indians as a sovereign and independent nation of "all of Lake Michigan which is south of said line," namely, a line running between the mouth of the Milwaukee river and the mouth of the Grand river, so that if appellants were claiming as a nation, their claim is in direct conflict with the above-

mentioned grant of the United States of America to the State of Illinois in 1818, and would also exclude the sovereignty which has for more than a century been exercised over Lake Michigan by the United States.

In this connection the court will take judicial notice of the fact that the government of the United States has appropriated millions of dollars which has been used in improving and protecting the harbor at Chicago. All these works are trespasses by the United States upon the rights of the appellant Indians, if their claims of ownership are well founded.

So, we confidently submit that if the bill of complaint could be treated as filed on behalf of the Pottawatomie NATION of Indians, it could not be sustained. However, it seems not to have been so filed, but rather to have been filed by the appellants claiming, as individuals, the lands referred to in the bill. These lands, it is to be noted, are not specifically described, but relate to all the lands submerged by Lake Michigan, which have been or may hereafter be reclaimed. Some where counsel for appellants refer to islands to which they may be entitled. But their bill is for reclaimed and submerged land; there are no islands involved. We do not think they would be entitled to islands off the shore of Lake Michigan, if there were any. But why speculate as to what their rights in islands might be, when there are none.

How stands the case with appellants claiming as individual owners? They admit that the predeces-

sors in their supposed title have parted with all their right to the shore lands. Hence, they have no claim as riparian owners. If their ancestors at some time were such riparian owners, their rights extended to the shore line and no further. The ownership of riparian owners extends to the thread of the stream in the case of rivers, but only to the shore line in the case of the Great Lakes. The ownership of the submerged lands in Lake Michigan is in the grantee of the United States, the sovereign, namely, the State of Illinois, and neither the appellants, as individuals, nor any predecessor in title of them, as individuals, ever in any view had any right, title or interest in or to such submerged lands.

In the case of *Revell* v. *The People*, 177 Ill. 468, the court, beginning on page 478, said:

> "The law is well settled in the different States that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein the lands are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water in our large lakes. (*People* v. *Kirk*, 162 Ill. 138; *Shively* v. *Bowlby*, 152 U. S. 9.) In the case last cited it is said: 'By the common law both the title and the dominion of the sea, and all rivers and arms of the sea where the tide ebbs and flows and of all the lands below high water mark within the jurisdiction of the crown of England, are in the king. Such waters, and the land which they cover, either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign,

> and for the purpose of fishing by all the king's subjects. Therefore, the title *jus privatum* in such land, as of waste and unoccupied lands, belongs to the king as the sovereign, and the dominion thereof *jus publicum* is vested in him, as the representative of the nation, for the public benefit.' In *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 452, in speaking of this question, the court said: 'That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subject to use. * * * It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.' Indeed, the doctrine that the state holds the title to the lands covered by the waters of Lake Michigan in trust for the people is not controverted in the argument. It will not, therefore, be necessary to cite further authorities upon that question.''

See also:

Bliss v. *Ward*, 198 Ill. 104; and
Cobb v. *Commissioners of Lincoln Park*, 202 Ill. 427.

We do not specifically refer to the decisions of this court on this point because the same are set out in the opinions above referred to.

The foregoing decisions are important, not only on the point on which they are above cited, but further as showing that the ownership of the lands submerged in Lake Michigan to the middle of the lake on the east, within the parallels of latitude here in-

volved, has been uniformly recognized to be in the State of Illinois and its grantees since the Enabling Act of Congress adopted in 1818, and the Ordinance and Constitution of the State of Illinois adopted in the same year.

To sum up, such Enabling Act precludes any ownership by the Pottawatomie Nation of Indians as *a sovereign and independent nation* over Lake Michigan or the lands submerged thereunder; and if the Pottawatomie Indians, as individuals, ever had any private ownership, the same extended only to the shore line of the lake where the ownership of the sovereign began.

As before stated, the appellee, City of Chicago, in addition to its jurisdiction as a governmental agency, has acquired in its private or proprietary capacity certain of the lands in question from the State of Illinois. To show, in part at least, the authority by which the appellee, City of Chicago, has acquired such lands from the State of Illinois, we quote from the statutes of that state, article V, section 1, as follows:

> "The city council in cities, and the president and the board of trustees in villages, shall have the following powers: * * *
>
> "Thirty-second. To erect and keep in repair public landing places, wharves, docks and levees.
>
> "Thirty-third. To regulate and control the use of public and private landing places, wharves, docks and levees.
>
> "Thirty-fourth. To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

"Thirty-fifth. To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

"Thirty-sixth. To fix the rate of wharfage and dockage.

"Thirty-seventh. To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.

"Thirty-eighth. To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.

"Thirty-ninth. To appoint harbor masters and define their duties."

Hurd's Statutes, 1915-1916, pp. 304 and 306.

Again, section 1 of an Act entitled, "An Act to enlarge the power of cities and villages in relation to harbors," etc., is as follows:

"That every city and village in this State shall have the right, power and authority, and such right, power and authority are hereby granted to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over and upon any public waters bordering thereon, harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all appropriate harbor structures, facilities, connections and improvements, and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental to transportation and railroad terminals, and to acquire, own, construct, maintain and operate all other necessary or appropriate terminal facilities."

Hurd's Statutes 1915-1916, p. 521.

Again, section 11 of an Act entitled, "An Act to authorize cities to acquire, construct, own and to lease or operate public utilities and to provide the means therefor," is as follows:

> "For the purpose of acquiring or constructing wharves, piers, docks, levees, or in connection with such wharves, piers, docks or levees, elevators, warehouses, vaults or necessary and appropriate tracks or terminal facilities, **any city may reclaim the submerged lands under any public waters within the jurisdiction of or bordering upon the city, and shall thereupon be vested with the absolute title, in fee simple, to the lands so reclaimed;** and for any of the purposes aforesaid the city may require, by purchase, condemnation or otherwise, the title of the private or public owners, if any there be, to lands lying beneath such public waters, and also the riparian or other rights, if any there be, of the owners of the shore lands abutting on such public waters in or over such public waters or the submerged lands under such waters. Nothing herein contained, shall give to any city the right to acquire submerged lands as against any park board where any grant has heretofore been made of such submerged lands to any such park board and been acted upon by such board."
>
> Hurd's Statutes 1915-1916, pp. 2049-2051.

Under the authority of the foregoing statutes, and other like statutes, the appellee, City of Chicago, has in its private or proprietary capacity acquired and erected on the lake front property worth millions of dollars. In doing so it has, of course, relied upon the right and power of the State of Illinois, under the above mentioned grant to it from the United States of America, to authorize it to acquire and erect such property. We submit that the

appellee, City of Chicago, had the right to so rely, and that its right and title to such property cannot now be questioned.

In conclusion we call the court's attention to the fact that appellee, City of Chicago, in its governmental capacity is a mere agency or subordinate branch of the government of the State of Illinois.

1 McQuillin Municipal Corporations, Sec. 107, pages 256-258.

In the case of *Mayor* v. *Ray,* 19 Wallace, 468, Mr. Justice Bradley, speaking for the court, said on page 475:

> "A municipal corporation is a subordinate branch of the domestic government of the state. It is instituted for public purposes only; * * * As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the needs to be accomplished."

In *Williams* v. *Eggleston,* 170 U. S. 304, Mr. Justice Brewer, speaking for the court, said on page 310:

> "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature."

In 28 Cyc. at page 282 it is said:

> "During the existence of the municipality it is subject to a large measure of legislative control. The sovereign power which has created it, and which may alter or dissolve it at pleasure, may likewise supervise and direct its conduct in all public matters. The state thus acts as general guardian of the person and property of the municipal corporation; and the only limi-

> tation upon its supreme legislative power in this particular will be found in the state or federal constitution. This power of control and supervision is a necessary corollary of the plenary power of the state over all public matters and concerns. It is the sovereign; and wherein not restrained by the supreme law of the land, the legislature, as trustee of the public for the general weal, has power and duty not only to interpose its arm for protection, but to show its might in positive and affirmative acts of government in particular matters over which it had conferred general charter power upon the corporation."

We, therefore, respectfully suggest that the real party in interest with respect to the greater part of the lands, over which this appellee has jurisdiction in its governmental capacity, is the State of Illinois, and that such state, it seems to us, ought to be a party to this proceeding, assuming that a court of chancery has any jurisdiction, which we deny for the reasons stated in the brief which we have adopted.

As we indicated in the beginning, this is intended merely as a supplement to the very able argument filed on behalf of the other appellees which we have adopted on behalf of this appellee.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

The appellants are in receipt of copy of a brief filed on behalf of all the appellees, except the City of Chicago. It is hoped that a reply brief will help clear up some points which may seem to be left obscure by the preceding briefs.

Preliminary to meeting the contentions made on behalf of appellees, let it be said that much of their labor was unnecessary. No question of sovereignty

is involved, nor is any claimed on behalf of the "Pottawatomie Nation," and appellees' counsel have evidently missed the distinction between political or personal rights of the Indians on the one hand, and their rights of property on the other hand. The former are subject to change or repeal; the latter, when vested, are protected by the Constitution. (See Appellants' Brief, pp. 119-122; Point XXXI).

I.

The first contention of appellees is that improper parties to the bill were made complainants and defendants. They are pleased to regard the bill as one brought by individuals, and cite a number of cases to support their contention that the bill should be brought by the nation or tribe itself. But this is a bill by the Pottawatomie Nation or such part of it as may be found to be entitled to invoke the provisions of the treaty. Who are so entitled is ordinarily a question for the administrative department of the government; but the enforcement of a treaty by the courts can only be asked on behalf of a tribe or nation. That is the extent of the meaning of the decisions relied on by appellees.

Appellants' brief fully recognized this situation and pointed it out (Brief, Point XLIII, pages 138-145). A suit by an Indian tribe or nation is properly brought when it is brought by its representative chiefs and tribal officers (Points XLIII, LXV, LXVII; Brief, pages 138-45, 36-38).

We presume, if complainants' bill, instead of reading "John Williams, Chief, *et al.*, bring this action

on behalf of themselves and of all members of the Pokagon band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, if any, who are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them," the bill had stated, "the Pokagon Band, the Pottawatomie Nation, and all others, etc., by John Williams, Chief," etc., it would have more nearly met the view of appellees. Any such difference (particularly in the matter of asserting an Indiana claim to which the technical rules of pleading have not ordinarily been applied) would be trivial and obviated by a very slight form of amendment. But even as to form the bill follows precedents approved by this court as indicated.

Appellees misapprehend the point of the decisions which they cite on this contention. A typical case is *Blackfeather* v. *United States*, 190 U. S. 368, cited on page 19 of their brief. The point is made that in that case the court "denied the jurisdiction to determine the rights of individual members of the tribes." The jurisdiction denied was that of the court of claims which had authority to proceed only under a special act, and the act failed to confer that jurisdiction.

In *Fleming* v. *McCurtain*, 215 U. S. 56, cited on pages 18-19 of appellees' brief, a point relied on seems to be, in the language of the court, "the grant also was at an end when the nations ceased to be," etc.; but that also was because of the peculiar provision of a treaty there involved, limiting the grant to the life of the nation as such. But the government never took advantage of this limitation.

Practically, the holding of those cases was that the original complainants did not show that they were members of the respective tribes and hence entitled to the benefit of treaties made with them; and that at all events the question was one for the government and not for the courts.

The contentions by appellees that the complainants "do not aver that they sustain any tribal relations" (Appellees' Brief, p. 23) is against the allegations of the bill (Trans. 1, Rec. 8; Trans. 2, Rec. 9, paragraph 2; also Trans. 4, Rec. 12, paragraph 12; Trans. 9, Rec. 22). If appellees' contention were true, however, that would be immaterial (Appellants' Brief, pages 144-145).

II.

The second contention of appellees is that a remedy at law exists. This is answered in the following portions of Appellants' Brief: pages 145-147; point LXXV, p. 40; point LXVI, p. 37; LXIX, p. 38; LXX, p. 39; LXXI, p. 39; LXXIII, pp 39-40. If appellees' contentions on this score are right, innumerable suits at law would have to be brought by the complainant tribe (and a suit at law by an Indian tribe is, we believe, without precedent); with each new trespass on a previously unoccupied piece of land a new suit at law would be brought, for according to the contention of appellees the title, if established, as to one piece of land, would not quiet the title as to another; and the procession of common law suits would never quite overtake new trespasses such as are alleged by the bill as being threatened

(Trans. 9-10; Rec. 22-23, paragraph 25-26). It is clear that such a situation is properly met by a bill in equity such as the present.

III.

This number presents appellees' contentions as to laches. These are fully anticipated and met in appellants' brief (pp. 126-136). Here two cases are cited in support of appellees' contention, viz.: *Schrimpscher* v. *Stockton*, 183 U. S. 290; *Felix* v. *Patrick*, 145 U. S. 317. *Both of these cases relate to titles which were made alienable by special treaties or statutes.* This is perhaps distinction enough. In addition are the following points of distinction:

1. Those cases were heard on the facts.

2. There was nothing on the record to put purchasers on notice and the rights of innocent purchasers had intervened. In the present case the Greenville treaty was notice to the whole world (Appellants' Brief, pp. 148-150) and actual notice is averred in the bill as to more or less of the lands in question (Trans. p. 5, Rec. pp. 14-15, Par. 16).

3. In the cases cited by appellees, actual adverse possession as distinguished from mere constructive possession, had run for the full period of limitations.

IV.

Under this number actual merits of the title are discussed. Reliance is particularly placed on the cases of *Johnson* v. *McIntosh*, 8 Wheat. 543; *U. S.* v. *Cook*, 19 Wall. 591; and *Beecher* v. *Wetherby*, 95

U. S. 517. Neither of these cases was decided with reference to the Greenville treaty and that treaty was in no wise under consideration or construction. In the first named case the facts under consideration arose some years before the Greenville treaty had been entered into. In the other two cases there had been a grant of section 16 in each township in Wisconsin, but the Indian title had not yet been extinguished in the greater part of the state. This court held that, though the Indian title was extinguished later, the fee granted to the state related back to the time of the grant by the government and the right of possession attached as soon as the Indian title was extinguished. It was in this sense that the language upon which appellees rely was used, viz.: "The possession, when abandoned by the Indians, attaches itself to the fee without further grant." "Abandoned," as pointed out in our brief (pages 170-174) is used in the sense of cession *and* removed by the Indians, or, in other words, the extinction of the Indian title.

It is apparent that appellees misconstrue the language of these decisions, which are later distinguished so as to bring them in entire harmony with the contentions of appellants in the present case. The *Cook* and *McIntosh* cases should be read in the light of *U. S.* v. *Paine Lumber Co.*, 206 U. S. 467; and *Beecher* v. *Wetherby* in connection with *M. K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114-117.

Mr. Justice Field said in the last named case, while commenting on *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55:

> "The right of the United States to dispose of the fee of land occupied by them, it added, has

> always been recognized by this court from the foundation of the government. There are, however, certain well established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. It has always been held that the occupancy of lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government *not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.*
>
> "*And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preemption.*"

Incidentally, it may be noted whenever the government did express such intention it was *when selling as guardian or trustee,* the proceeds becoming trust funds for the Indians.

What was said in *Doe* v. *Wilson,* 64 U. S. 457, is explained in *Crews* v. *Burcham,* 1 Black, 352, wherein the court said:

> "Some expressions in the opinion delivered in the case of *Doe* v. *Wilson,* the first case that came before us arising out of this Treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court held the reservee was a tenant in common with the United States *after the Treaty of Cession,* and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title."

Furthermore, counsel seem to overlook the language cited by themselves in *Beecher* v. *Wetherby*, as follows (Appellees' Brief, p. 48):

"The grantee, it is true, would take only the naked fee, and that could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."

Appellees make the argument that the Great Lakes were not included in the grant from the United States to the Indians in and by the Greenville Treaty (Appellees' Brief, p. 44, *et seq.*), because of the expression "westward and southward of the Great Lakes," even though "according to the boundary line agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year 1783." They seem to concede that the islands and the lakes were relinquished to the Indians. *This at least is a recognition of the Indian title in that part of the lands in question which was formerly an island.*

Appellees' argument is, however, answered in appellants' brief, Nos. I and II, p. 41-54.

Appellees' contention is that the word "lands" as used in the Greenville Treaty does not include submerged lands, but the same word used in the treaty of October 27, 1832 (Appellees' Brief, p. 52, *et seq.*), does include submerged lands. Both of these contentions certainly cannot stand. If the contention as to the later treaty is correct, then it inevitably follows that the relinquishment by the Greenville Treaty of all the "lands" northwest of the river Ohio included the submerged lands. But

it does not from that construction follow that the submerged lands were re-ceded by the later treaty, as we have pointed out in our brief. The former contention is certainly inconsistent with the very language of the portion of the Greenville Treaty by them cited (p. 45), that the "Indian tribes will allow to the people of the United States a free passage by land *and by water*" and that they will give them "the free use of the harbors and mouths of rivers," etc. Even the recognition of title to this much of the bed of the lakes would answer our purpose in this case. This was evidently language intelligible to the Indians, giving to the United States the right of navigation over the Great Lakes, but whether so or not, it is merely a circumstance which should be considered with all others, which are very clear, as indicated in appellants brief, pp. 41-54.

The effect of the above Tippecanoe Treaty of 1832 is by us commented on at pages 171-174 of our brief.

Counsel quote language from *Crews* v. *Burcham*, 1 Black 352, wherein the court, in its statement of the case, said:

> "By the Treaty of 1832 the Pottawatomie Indians ceded to the United States *all* their lands in Illinois, Indiana and Michigan south of the Grand river."

The inclusion of the word "all' by the court is an inadvertence, as it does not appear in the treaty; but if it were not, it could not be said that the statement by the court was intended to amend the treaty itself. That cannot be done (Appellants' Brief, p. 175). Nothing of the kind is decided by the case it-

self. This clause in the treaty, however, can hardly mislead anyone. (See Appellants' Brief, pp. 171-174).

On page 55 of their brief, appellees claim that the acts of the government indicate the manifest purpose to terminate the Indians' rights in the territory. Our views on this contention are presented on pages 88-90 of our brief.

Appellees seem to still adhere to the theory that the State of Illinois, by the mere fact of its admission into the union, acquired title to the submerged lands of Lake Michigan; and cite *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*, 16 Pet. 367, and *Illinois Central Railroad Company* v. *Illinois*, 146 U. S. 387. The first named case itself is against appellees' contention, as manifested by the following language appearing in it (page 58):

> "The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant for appropriate purposes titles or rights in a soil below high water mark of tide waters."

This was done in the Greenville Treaty, before the admission of Illinois as a state.

For further comment on this subject, we refer to pages 160-164 of our brief.

Respectfully submitted,

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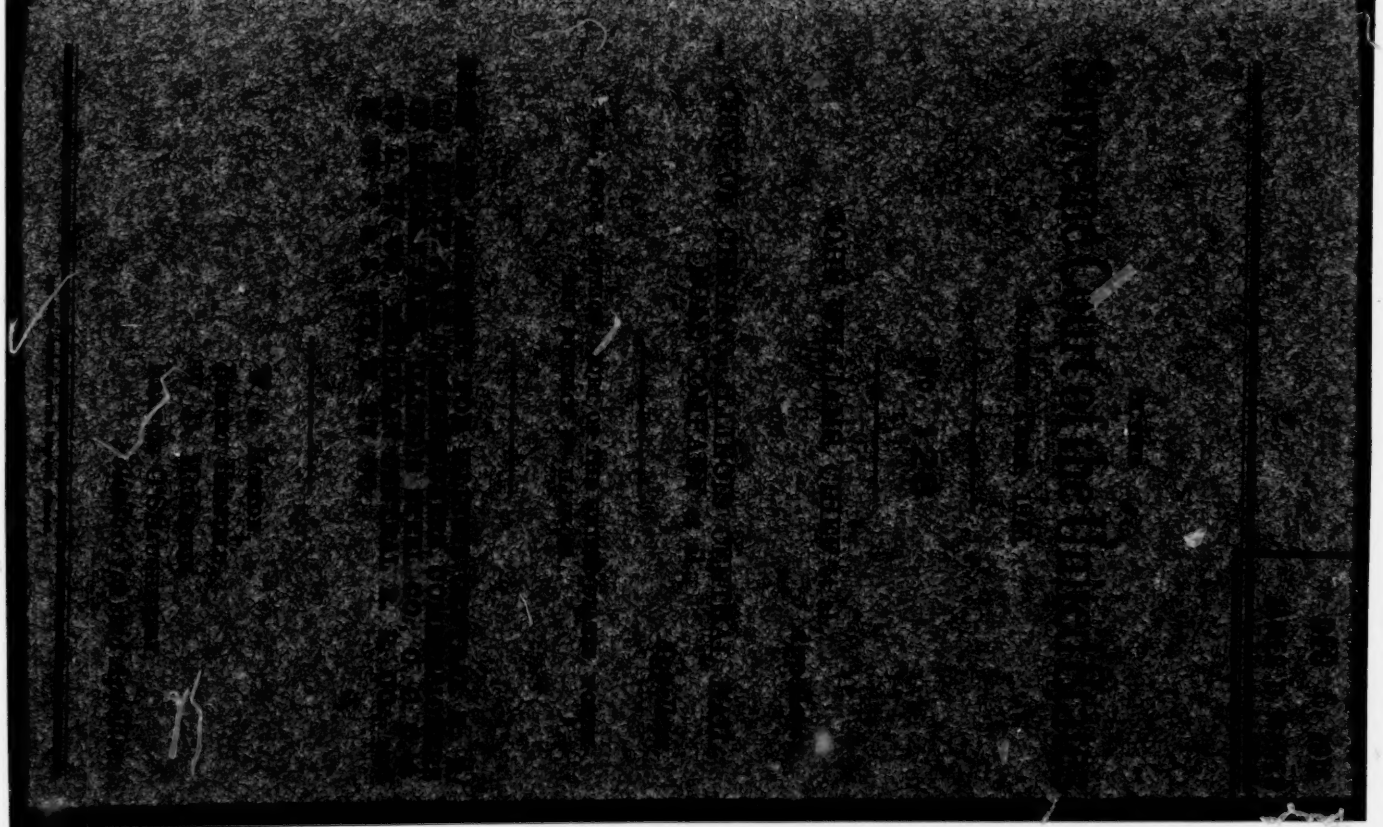

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 128

JOHN WILLIAMS, CHIEF et al.,
Appellants,

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY et al.,
Appellees.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEES.

(Note.—The failure herein to note more fully the argument for appellants is because the near approach of the hearing has made it necessary to prepare this brief before the receipt of the brief for them.)

This is an appeal from a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered May 4, 1914, sustaining motions of the defendants to dismiss the bill of complaint as amended, and dismissing it. (Rec., 38.) Each defendant filed its separate motion, assigning many reasons apparent on the bill's face, of which that by the Illinois

Central Railroad Company (Rec., 35-8) is a fair sample. All the points here raised are made there.

The bill is by complainants, who describe themselves as "Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians *residing in the State of Michigan.*" (Rec., 1.) They represent that they bring the action "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and all other members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them." But though the recitals of the bill show the title claimed, if any, is in the Pottawatomie Nation of Indians, no attempt is made to explain the absence of that Nation or tribe as a party, nor are any facts stated to justify complainants' action in its behalf.

The claim of the bill is that from time immemorial preceding August 3, 1795, when the treaty of Greenville, hereafter mentioned, was consummated, the Pottawatomie Nation of Indians were the owners and in possession "as a sovereign and independent nation," of large tracts of land around and along the shores of Lake Michigan.

"South of a line running through the North of the Milwaukee River in the now State of Wisconsin, and the mouth of the Grand River in the now State of Michigan extending said line east and west of said two points, and *including all of Lake Michigan which is south of said line.*" (Rec., 2.)

It is averred that by the treaty of Greenville the United States relinquished their claims to all Indian lands, other than those enumerated in said treaty as ceded to the United States, which lay northward of the river Ohio, eastward of the Mississippi,

"*and westward and southward of the Great Lakes* and the waters uniting them, according to the boundary line

agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783" (Rec., 2.),

which relinquishment is charged to have included the lands and country "of the said Pottawatomie Nation," except as by the treaty ceded to the United States. Certain articles of the treaty are recited, including Article V (Rec., 3), which explains the meaning of the relinquishment made by the United States. While that article marks the absence of intention of the United States to vest in the nations or tribes of Indians either the ownership or the sovereignty of Lake Michigan or its submerged lands, the bill asserts that all such lands within the geographical limits of the State of Illinois "have remained and still are the property *of these complainants*" (Rec., 5), which they are "at liberty to occupy, sell, lease or otherwise dispose of *as their own lands in fee simple* without let or hindrance from the United States or any one else." (Rec., 6.)

The bill denies that at the time of the admission of the State of Illinois into the Union, the United States had title to any of such lands; and asserts that by that admission the State of Illinois acquired no title, and that no firm, person or corporation, municipality or other, has any power over or authority to dispose of any part thereof, or to occupy or seize the same without the consent of "these complainants." But it is charged that the City of Chicago passed an ordinance July 31, 1913, in relation to the establishment of a harbor district in said lake, and that it will proceed so to do, unless restrained by the court (Rec., 6-7); that on February 10, 1851, the State incorporated the Illinois Central Railroad Company, and authorized it to locate and construct its railroad, but not in cities without the consent of the Common Council; that the City of Chicago adopted an ordi-

nance June 14, 1852, authorizing that Company "to fill in portions of Lake Michigan which were and are the property of your orators, and without the consent of your orators, and the defendant, the Illinois Central Railroad Company, did seize and fill in portions of said Lake Michigan, in pursuance of such purported authority by the Act of the State of Illinois and the ordinances of the City of Chicago last named, *and has ever since then held and occupied the same* without the consent of these complainants or of the Pottawatomie Nation." (Rec., 7.) Many other Acts of the Illinois General Assembly are averred (Rec., 8)—all of which, however, show continuous exercise of jurisdiction and authority by the State.

It is averred that in 1833, the Pokagon Band was a component part "*of the larger body or nation of Pottowatomie Indians* named in the said treaty of Greenville, and in subsequent treaties with the Government"; that in that year, the Pottawatomie Nation became divided, and that portion thereof not belonging to the said Pokagon Band migrated to a new country west of the Mississippi River,

"leaving the said Pokagon Band in possession, occupancy and control and in sovereignty *of whatever territory then remained unceded* by the said Pottawatomie nation to the United States of the original land or country of the said Pottawatomie nation, and title in and to and control and sovereignty—the same has remained in the said Pokagon Band to the present time except and unless as affected by the aforesaid deed to William H. Cox." (Rec., 9.)

The prayer is that the defendants may be enjoined from making any other seizures of the "lands of the complainants" during the pendency of the suit and "until the rights of the complainants in the premises can be fully adjudged and established"; that each of the defendants "be compelled to wholly remove therefrom

and from every part thereof, and that they and each of them be perpetually enjoined and barred from setting up or asserting any claims, title or interest in or to such lands, or any part of them"; that the several statutes of the State and the ordinances named be declared void; that each of the defendants be required to account and pay the complainants a reasonable compensation for the use and occupancy of the lands for the period during which occupied, and that

"the title *of these complainants* in and to such several lands may be quieted, established and confirmed in accordance with the provisions of said treaty." (Rec., 11.)

The bill, in short, is by certain individuals forming a Business Committee of the Pokagon Band, who claim the sovereignty over and ownership of all that part of Lake Michigan opposite the City of Chicago, but who aver they reside in the State of Michigan. They base their claim, in part, upon an assertion that the "Pottawatomie Nation of Indians" (Rec., 2) were the owners and in possession and occupancy as a sovereign and independent nation from time immemorial preceding the making of the treaty of August 3, 1795, of the described lands and part of Lake Michigan, and, in part, upon the treaty of that date, which, the bill avers, the United States made with the "Pottawatomie Nation of Indians" (Rec., 2); but no facts are averred to warrant an assumption of title either in the complainants or the Pokagon Band, or to explain the failure of the Pottawatomie Nation, as a nation or tribe, to bring the suit, or to justify complainants in bringing it.

It is not averred in the bill that the complainants are members of any tribe, or that even the Pokagon Band maintains its tribal relation. It is not charged that they are not citizens of the United States, or that they are

now, or have been, under any disability to assert in court the rights claimed. No word of excuse is offered for failure to assert a sovereignty and ownership which has been consistently ignored by the Government of the United States, the State of Illinois, and all municipalities and owners of lands along Lake Michigan for more than seventy-five years past.

The defects in the bill are specified in the motions to dismiss. The District Court, after a patient hearing, sustained the motions. The decree entered was in accordance with the facts shown in the bill and the laws and treaties of which the court takes cognizance.

BRIEF.

I.

THE PARTIES.

The bill does not show right in complainants, either personally or as the Chief and Business Committee of the Pokagon Band, to maintain the suit. Whatever title exists in the Indians is in the Pottawatomie tribe or nation.

7 Stats. at Large, p. 49.

Phineas Pam-To-Pee v. *United States*, 148 U. S., 691, 705.

Fleming v. *McCurtain*, 215 U. S., 56, 61, 63.

Sac and Fox Indians v. *Sac and Fox Indians*, 220 U. S., 481, 483, 487, 489.

Blackfeather v. *United States*, 190 U. S., 368, 377.

Choate v. *Trapp*, 224 U. S., 665.

Stephens v. *Cherokee Nation*, 174 U. S., 445.

United States v. *New York Indians*, 173 U. S., 464.

Franklin v. *Lynch*, 233 U. S., 269, 271.

Myers v. *Mathis* (Ind. Ter.), 46 S. W., 178.

Cherokee Nation v. *Hitchcock*, 187 U. S., 294, 307.

Gritts v. *Fisher*, 224 U. S., 640, 642.

Cherokee Trust Funds, 117 U. S., 288, 308, 311.

None of the treaties mentioned in the bill were made with the Pokagon Band, but with certain large Indian tribes or nations, including the Pottawatomies. The parties to treaties are those named therein.

Fellows v. *Blacksmith*, 19 How., 366.

United States v. *New York Indians*, 173 U. S., 464, 469.

But not only is the tribe with which the treaties were made not a party, but no facts are stated to justify the suit by the complainants, even if still members of the tribe—a condition not averred. The right to maintain this suit can be no stronger than that of an individual stockholder to maintain a bill in behalf of the corporation. He must aver refusal by the company to act, or other excuse, and make the company a party, so that all rights may be adjudicated.

Bruschke v. *Nord Chicago, etc. Verein, et al.*, 145 Ill., 433, 445.

Green v. *Hedenberg*, 159 Ill., 489.

Farwell v. *Great Western Telegraph Co.*, 161 Ill., 522, 606, 610.

If the title is in the Pottawatomie tribe or nation, it is a necessary party.

Swan Land & Cattle Co. v. *Frank*, 148 U. S., 603, 611.

Moreover, if the Pottawatomie Indians no longer maintain their tribal relation, their rights under the treaties are at an end. If the tribal relation is maintained, authority in these complainants to sue for or on behalf of the tribe or nation should be averred.

Holden v. *Joy*, 17 Wall., 211, 242.

Cherokee Nation v. *Georgia*, 5 Pet., 1, 19, 20.

Thebo v. *Choctaw Tribe* (C. C. A., 8th Ct.), 66 Fed., 372, 373, 375.

In re Celestine (D. C.), 114 Fed., 551, 552.

Fleming v. *McCurtain*, 215 U. S., 56, 61.

II.

A REMEDY AT LAW EXISTS.

While the complainants ask for injunctive relief, it is incidental to, and dependent upon, the establishment of their right in the lands. In such cases the right must first be established at law. The bill, in different paragraphs, shows the defendants in possession of lands as an appurtenance to which they propose to further fill in the lake. The prayer of the bill is that the title of the complainants may be quieted, established and confirmed. But upon such showing of possession of the lands by the defendants, a bill for that purpose cannot be maintained.

McGuire v. *Pensacola City Co., et al.* (C. C. A., 5th Ct.), 105 Fed., 677, 680.

Livingston County etc. Association v. *Keach*, 219 Ill., 9, 11.

Porter v. *Armour & Co.*, 241 Ill., 145, 151.

Parker v. *Shannon*, 114 Ill., 192, 195.

Stolp v. *Hoyt*, 44 Ill., 219.

Bliss v. *Kennedy*, 43 Ill., 67, 75.

United States v. *Bitter Root Development Co.*, 200 U. S., 451.

Ellis v. *Davis*, 109 U. S., 485, 493.

Smyth v. *N. O. Canal, etc. Co.*, 141 U. S., 656.

Frost v. *Spitley*, 121 U. S., 552, 556.

Whitehead v. *Shattuck*, 138 U. S., 146, 151.

Washburn's Appeal, 105 Pa. St., 480, 482.

III.

LACHES.

The United States and the States of which Lake Michigan is a part have for more than one hundred years exercised full sovereignty and jurisdiction over Lake Michigan. The municipalities and owners of land bordering upon it in Illinois have long asserted ownership of reclaimed lands, and by various Acts of the legislature title has been vested in them. The complainants bring this suit as matter of right and make no pretense that they are not citizens, or that they are, or have been under disability to earlier bring the action. They do not claim either that their Band, or that the Pottawatomies, maintain the tribal relation. They claim an absolute title and not one in subserviency to the United States. Under the conditions shown, the rule of laches applies.

Schrimpscher v. *Stockton,* 183 U. S., 290, 296.
Elmendorf v. *Taylor,* 10 Wheat., 152.
Hall v. *Law,* 102 U. S., 461.
Felix v. *Patrick,* 145 U. S., 317, 329.

IV.

THE MERITS.

The complainants assert two sources of title: (1) that the Pottawatomie Nation of Indians were the owners and in possession and occupancy as a sovereign and independent nation from time immemorial preceding the treaty of August 3, 1795 (Rec., 2); and (2) the treaties from time to time made with the Pottawatomie Nation. Neither claim is well founded. The Indians did not have the ownership of, or sovereignty over, Lake Mich-

igan, when the treaty of August 3, 1795, was made; they were not given it by that treaty; and whatever rights in the lands bordering upon the Lake were given them were afterwards receded to the United States by the subsequent treaties.

(1) This court has frequently decided that the United States, like the British Government before it, holds the sovereignty and the ultimate title to all lands occupied by the Indians within the geographical limits of this country; and that the Indian right is that of mere occupancy which the Government may extinguish either by purchase or conquest.

Johnson v. *M'Intosh*, 8 Wheat., 543, 573, 584, 586, 587, 588.
Mitchel v. *United States*, 9 Pet., 711, 745.
United States v. *Cook*, 19 Wall., 591, 592.
Shively v. *Bowlby*, 152 U. S., 1, 14.
Martin v. *Waddell*, 16 Pet., 367, 409, 410.
United States v. *Rogers*, 4 How., 567, 571.
Cherokee Nation v. *State of Georgia*, 5 Pet., 1, 48.

In harmony with the above, it is held that upon the discovery of this country the title to the waters and unoccupied lands vested in the King of England, and subsequently in the United States.

Shively v. *Bowlby*, 152 U. S., 1, 14, 57.
Martin v. *Waddell*, 16 Pet., 367, 409, 410, 416.

And the same rule which places in the Government the absolute title and right to possession of tide waters and the lands thereunder, applies equally to the Great Lakes.

Illinois Central R. R. Co. v. *Illinois*, 146 U. S., 387, 434, 435.

The court, moreover, will take notice that whatever of occupancy the Indian tribes had of the waters or sub-

merged lands of Lake Michigan in question, has long been abandoned; that they have not occupied even the adjoining lands for more than seventy-five years. When there is an abandonment by the Indians of occupied territory, their rights therein cease.

United States v. *Cook*, 19 Wall., 591, 593.
Cherokee Nation v. *Georgia*, 5 Pet., 1, 16.
United States v. *Arrendondo*, 6 Pet., 691, 746.

(2) The treaties upon which complainants rely do not cede the Great Lakes to the Indians. The description of the territory relinquished by the United States is of "Indian lands" "westward and southward of the Great Lakes and the waters uniting them."

7 U. S. Stats. at Large, p. 51, Art. 4.
Shively v. *Bowlby*, 152 U. S., 1, 13.
Martin v. *Waddell*, 16 Pet., 367, 411.

And not only so, but by the treaty of August 3, 1795, the Indians agreed to allow the people of the United States free passage by land and by water through their country along the chain of posts mentioned. The description of the routes of travel does not include the Great Lakes, but harbors and rivers reached or starting from the Lakes, thus indicating that the possession of and sovereignty over the Lakes remained in the United States.

7 U. S. Stats. at Large, p. 50.

Moreover, the cessions to the Indians were to them as tribes and did not give any other or different character of title than the Indians previously had, namely, that of occupancy.

Treaty of August 3, 1795 (7 U. S. Stats., 50-52).
Beecher v. *Wetherby*, 95 U. S., 517, 525.
Jones v. *Meehan*, 175 U. S., 1, 8.

Veale v. *Maynes*, 23 Kas., 1, 19, 25.
M. K. & T. Railway Co. v. *Roberts*, 152 U. S., 114, 116.
United States v. *Rogers*, 4 How., 567, 572.

The complainants rely upon the treaty of August 3, 1795, but an examination of it discloses no intention on the part of the United States to relinquish to the Indian tribes any other title than that of occupancy, and none whatever in the waters of Lake Michigan or its submerged lands. The relinquishment was of "Indian lands," which were described as "westward and southward of the Great Lakes"; and all those lands were subsequently re-ceded to the United States by treaties of which the court will take judicial notice.

Worcester v. *State of Georgia*, 31 U. S., 515.
United States v. *Schooner Peggy*, 1 Cranch., 37, 40.
United States v. *Reynes*, 9 How., 127, 147.
Myers v. *Mathis* (Ind. Ter.), 46 S. W., 178.
Kreuger v. *Schultz* (N. Dak.), 70 N. W., 269.
Beebe v. *United States* (Dak.), 11 N. W., 505, 510.
Gay v. *Thomas* (Okl.), 46 Pac., 578, 583.
United States v. *Martin*, 14 Fed., 817.
United States v. *Rauscher*, 119 U. S., 407, 418.

Among such treaties are those made August 24, 1816 (7 U. S. Stats. at Large, p. 146); August 19, 1825 (7 U. S. Stats. at Large, p. 272); October 16, 1826 (7 U. S. Stats. at Large, p. 295); July 29, 1829 (7 U. S. Stats. at Large, p. 320); October 20, 1832 (7 U. S. Stats. at Large, p. 378); October 27, 1832 (7 U. S. Stats. at Large, p. 399); September 26, 1833 (7 U. S. Stats. at Large, p. 431); September 27, 1833 (7 U. S. Stats. at Large, p. 442); February 8,

1831 (7 U. S. Stats. at Large, p. 342); June 5th and 17th, 1846 (9 U. S. Stats. at Large, p. 853); November 15, 1861 (12 U. S. Stats. at Large, p. 1191);

Numerous other treaties with Chiefs of the Pottowatomie Nation, to whom had been given particular tracts of land in this territory, under prior treaties were made under dates of December 4, 1834, December 10, 1834, December 17, 1834, March 26, 1836, March 29, 1836, April 11, 1836, April 22, 1836, August 5, 1836, September 20, 1836, September 22, 1836, September 23, 1836, whereby the particular Indians relinquished their possessions and agreed to move within the limited time to the territory provided for the Pottawatomie Indians west of the Mississippi River. Practically all of these treaties provide for the payment of large sums of money, not only to bear the expense of removal, but to purchase particular equities or interests found to exist. They evidence the detail and care with which the Federal Government secured formal relinquishment of all Indian rights in this territory. It is clear from them that whatever rights were ceded to the Indians by the treaties cited by complainants in their bill were subsequently re-ceded to the United States. And it has been so held.

Phineas-Pam-To-Pee v. *United States*, 148 U. S., 691.

Crews v. *Burcham*, 1 Black., 352.

Doe v. *Wilson*, 23 How., 457, 461.

The continuous exercise of sovereignty and acts of ownership over the waters of the Great Lakes, together with the recession to the United States of all the "Indian lands" covered by the earlier treaties, is consistent only with a purpose to free all this territory from Indian claims. Any recognition of sovereignty over or ownership of Lake Michigan or its submerged lands will be

utterly inconsistent with the Government's policy, the treaties and the repeated decisions of this court.

Lone Wolf v. *Hitchcock*, 187 U. S., 553, 565.

Act of Congress, March 3, 1871; Fed. Stats., Vol. 3, p. 357.

Stephens v. *Cherokee Nation*, 174 U. S., 445, 483.

Choate v. *Trapp*, 224 U. S., 665, 671.

M. K. & T. Ry. v. *Roberts*, 152 U. S., 114, 116.

Kindred v. *Union Pacific Ry. Co.*, 168 Fed., 648, 652.

ARGUMENT.

I.

THE NECESSARY PARTIES.

The bill avers a title in the Pottawatomie Nation of Indians, but the suit is by individuals. The treaty of August 3, 1795, given as one source of title, is alleged to have been made with the Pottawatomie Nation or tribe. It was in fact made between the United States of America "and the tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-River, Weea's, Kickapoos, Piankashaws and Kaskaskias." (7 U. S. Stats. at Large, p. 49.) Another claimed source of title is the alleged ownership possession and occupancy of "the said Pottawatomie Nation of Indians" (Rec., 2) as a sovereign independent nation. It is that tribe or nation which the bill avers was the owner of the lands and water in question, prior to the treaty, and the grantee under its terms. The suit, however, is by "John Williams, Chief, Michael Williams, Secretary, Thomas Topash, Chairman Business Committee, Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, residing in the State of Michigan." (Rec., 1.) They allege that they bring the action "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, *if any* are entitled to join herein with them, and of all others, *if any*, who are entitled to join herein with them."

The bill not only omits the Pottawatomie Nation or

tribe as a party and fails to sue for or on its behalf, but in paragraph 24, after averring that until the year 1833, the Pokagon Band of the Pottawatomie Nation was a component part "of the larger body or nation of Pottawatomie Indians named in the said treaty of Greenville and in subsequent treaties with the Government of the United States," and "that in the last named year the said Pottawatomie Nation became divided, and *that portion thereof not belonging to the said Pokagon Band* migrated to a new country or territory west of the Mississippi River, under and in pursuance of a treaty with the Government of the United States" (Rec., 9), it is averred that the said Pokagon Band was left in possession, occupancy, control and sovereignty of whatever territory *then remained unceded* by the Pottawatomie Nation to the United States, and that the title "has remained in the said Pokagon Band to the present time" except as affected by a deed alleged to have been given William H. Cox. The prayer is that the title be quieted in them. In short, the bill, after averring title in the Pottawatomie Nation, seeks to have established an individual ownership, or, at the most, title in the Pokagon Band.

It is apparent from the treaty of August 3, 1795, that the cession made by the United States was not to the individual members of tribes, or to some particular Band, but to the Pottawatomie Indians as a whole.

In *Pam-To-Pee et al.* v. *United States*, 148 U. S., 691, Mr. Justice Shiras thus explained the parties to these treaties:

"In some of the treaties, various tribes united with the Pottawatomies, but the tribes were recognized by the government as being distinct from one another, and their respective rights and duties under the treaties were therein defined and set forth. In others the Pottawatomie Indians were included in the tribe designated as the 'United Nation of Chippewa, Ottawa and Pot-

tawatomie Indians,' but the government seems to have dealt with the United Nation as though it were identical with the Pottawatomie tribe, and we shall so consider it in the present case."

Moreover, in Article V of the treaty of August 3, 1795, it is recited that in order to prevent any misunderstanding about the Indian lands relinquished by the United States, it is declared that the meaning of that relinquishment is this:

"*The Indian tribes* who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but *when those tribes*, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States." (7 U. S. Stats. at Large, p. 52.)

Thus, not only was the treaty made with the nation or tribe, but in that instrument is the explanation that the relinquishment is to the "tribes," with the restriction that none of them shall dispose of any part of the lands except to the United States. The individual Indians are by the very terms of the treaty prevented from acquiring title.

In *Fleming* v. *McCurtain*, 215 U. S., 56, a bill in equity purported to be brought by and on behalf of some 13,000 persons "all persons of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made" of certain property in Oklahoma. The bill was demurred to for want of equity. The principal controversy was over the grant and letters patent issued in pursuance of the treaty of Dancing Rabbit Creek of September 27, 1830 (7 Stat., 333) conveying a tract described to the Choctaw Indians in fee simple, and to their descendants to inure to them while they should exist as a nation and live thereon. It was held that the grant did not create a trust for the individuals then compris-

ing the nation and their respective descendants. Among other things, the court said (p. 61):

"What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely."

And again, it is said (p. 63):

"Neither do the plaintiffs claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship. They do not allege that they are citizens or attempt to bring themselves within any grant later than the treaty and patent that we have discussed."

In *Blackfeather* v. *United States*, 190 U. S., 368, the court considered the jurisdiction of the Court of Claims under the Act of October 1, 1890, to determine the rights in law or equity of the tribes of the Shawnee and Delaware Indians, and denied the jurisdiction to determine the rights of individual members of the tribes, and in the course of the opinion approved the following remarks of the Court of Claims (p. 377):

"The attention of the court is called to the fourteenth article (of the treaty of 1854), which provides that 'The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated.' Does this phraseology establish contractual or treaty relations, having the effect of contracts, with each individual Indian composing the Shawnee tribe? Or, rather, is it not a general clause, limited in its effect to the parties to the treaty, to wit, the United States on one side and the Shawnee tribe upon the other?

The plaintiff, by the allegations of the petition, has asserted an individual obligation existing between the United States and each of the claimants, and in order to recover it must appear that such a relation exists.

The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

The case of *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma et al.*, 220 U. S., 481, was commenced under the Act of March 1, 1907, 34 Stat., 1055, giving to the Court of Claims full legal and equitable jurisdiction of all claims of the plaintiffs against the defendants for their alleged "proportionate shares according to their numbers" not already paid to them, of appropriations for fulfilling treaty stipulations. The Iowa Indians contended that they had not received their share of the annuities. The court referred to the character of title given the Indians by the various treaties, saying (p. 483):

"We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S., 379, 387. The Government did not deal with individuals, but with tribes. *Blackfeather* v. *United States*, 190 U. S., 368, 377. See *Fleming* v. *McCurtain*, 215 U. S., 56. The promises in the treaties under which the annuities were due were promises to the tribes."

And in concluding, it was said (p. 489):

"The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members."

In *Choate* v. *Trapp*, 224 U. S., 665, the court, in considering the tax exemption of Indian lands allotted

under the Curtis Act of June 28, 1898, 30 Stat., 505, thus stated the title of the individual Indians in lands held by or ceded to a tribe (p. 671):

"The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States.

The individual Indian had no title or enforcible right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled."

In *Cherokee Trust Funds*, 117 U. S., 288, the court, in considering the claim of the Cherokees of North Carolina to a share of a commuted annuity created by sales of land west of the Mississippi River ceded to the Cherokee Nation, held that it was a fund intended for the benefit of the United Nation, and not for those who had separated from it and become aliens to their nation. It was said (p. 308):

"The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nations, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members."

It was there held that the Cherokees of North Carolina dissolved their connection with the Nation when they refused to accompany the body of it on its removal, the court saying (p. 311):

"If Indians in that State, or any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation."

In *Gritts* v. *Fisher, etc.*, 224 U. S., 640, suit was begun by three Indian members of the Cherokee tribe on behalf of themselves and all others similarly situated, to determine whether children born to enrolled members after September 1, 1902, and living March 4, 1906, were entitled to enrollment as members of the tribe and to participation in the allotment of its lands and funds. The court referred to the legislation of Congress looking to the distribution of the lands of the five civilized tribes among their respective members and to dissolution of the tribal governments, and said (p. 642):

"Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible."

Other cases are cited in the brief. They refer to other treaties or statutes, but in none of them is the ceded right more directly limited to the tribe or nation than by the treaty of August 3, 1795. Nor do the averments in the twenty-fourth paragraph of the bill (Rec., 9) aid complainants. Indeed, it is there recognized that the

Pokagon Band was only a part of "the larger body or nation of Pottawatomie Indians," and that in the year 1833, that portion of the Pottawatomie Nation not belonging to the said Pokagon Band migrated to a new country west of the Mississippi River, in pursuance of a treaty with the Government of the United States. The averments of that paragraph are to be read in connection with the treaties of August 24, 1816 (7 U. S. Stats., 147), October 20, 1832 (7 U. S. Stats., 378), October 27, 1832 (7 U. S. Stats., 399), September 26, 1833 (7 U. S. Stats., 431), September 27, 1833 (7 U. S. Stats., 442), and so read it will be found that no land in the State of Illinois was left unceded. Not only so, but by the supplementary treaty made September 27, 1833 (7 U. S. Stats., 442), to which the Pokagon Band was a party, it was agreed that the Indians located in Michigan should be a party to the treaty of September 26, 1833, in the last sentence of Article II of which is the provision:

"It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States."

The bill itself does not aver that the complainants or the Pokagon Band remained in possession of any land in Illinois, and the treaties to which reference is made expressly prohibit them from so doing. Therefore, this suit, brought by individual Indians, who do not aver that they sustain any tribal relations, is not sufficient in parties. It should not be permitted, because an adjudication therein will not be a defense to a suit brought by the Pottawatomie nation or tribe, if authorized to do so.

Moreover, it is not averred that the Pottawatomie Indians maintain their tribal relation, and if not, their

rights in the waters of Lake Michigan and the lands submerged thereby, of which they have had no occupancy or possession, is at an end.

Fleming v. *McCurtain,* 215 U. S., 56, 61.

And the Pokagon Band, by failing to remain a part of the Pottawatomie Nation, as well as to occupy the territory now claimed, are without right.

Cherokee Trust Funds, 117 U. S., 288, 309.

II.

A REMEDY AT LAW EXISTS.

Another objection to the bill is that a remedy at law exists. While the complainants ask for injunctive relief, it is incidental to and dependent upon the establishment of their rights in the lands. The defendants should not be restrained on behalf of these complainants, unless the latter have title, which is the main object of the bill and can be settled by suit at law.

It is averred in paragraph 5 of the bill that the proceeding is brought "for the restoration to the complainants of lands so relinquished by the United States and not included in any cession to the United States" (Rec., 2); in paragraph 16 (Rec., 5), "That many firms, persons and corporations, including the defendants herein named, consisting of citizens of the United States and other white persons, have without the consent of these complainants, or of the Pottawatomie Nations, from time to time seized large tracts of land, both reclaimed, artificially made and others, East, Northeast and North and altogether outside of any of said cessions to the United States"; in paragraph 18 (Rec., 6), that "owing to the acts of the defendants and others above stated, by seizing some of said lands and occupying the same

to the exclusion of these complainants, a cloud has been created upon the title of these complainants in and to said lands and their ability to sell or lease or otherwise dispose of the same, or any parts thereof"; in paragraph 25 (Rec., 9), "that the several defendants hereinafter named above, from time to time under the purported authority of the State of Illinois, and under color of laws and statutes thereof, but without any authority at all and without consent or authority on the part of the Pottawatomie Nation of Indians, or any one claiming by, through or under them, filled in large portions of said Lake Michigan and have settled or threaten to settle upon portions of the same, and have seized and occupied and still continue to occupy them, or threaten to seize or occupy portions of them"; and in paragraph 21, that the Illinois Central Railroad Company was authorized by the City of Chicago, June 4, 1852, "to fill in portions of Lake Michigan which were and are the property of your orators and without the consent of your orators, and the defendant, the Illinois Central Railroad Company, did seize and fill in portions of said Lake Michigan, in pursuance of such purported authority, * * * and has ever since then held and occupied the same." (Rec., 7.)

The prayer for relief, in substance, is, that the defendants may be

"perpetually enjoined and restrained from seizing, occupying or building any structures upon any part of the lands of these complainants above described, whether reclaimed or submerged, and from filling in or reclaiming any such submerged lands lying East, Northeast or North of the boundary lines of cessions to the United States heretofore made, without the consent, permission or authority of these complainants, *and to be compelled to wholly remove therefrom and from every part thereof, and that they, and each of them be perpetually enjoined and barred from setting up or asserting any*

claims, title or interest in or to such lands, or any part of them; * * * that they, the said several defendants, and each of them, may be required to account and pay to these complainants a reasonable compensation for the use and occupancy of the said lands for the periods during which such several occupancies have heretofore been had; *that the title of these complainants in and to such several lands may be quieted, established and confirmed in accordance with the provisions of said treaty.*"

In short, the bill avers that the defendants are in possession and seeks by injunctive relief to compel them to give up and surrender the lands and that the title may be quieted and confirmed in complainants. It is not averred that the title has been established at law, but discloses the existence of conditions by which it may be so established. The cases cited in the brief are clear that under the showing thus made the bill is bad.

In *McGuire* v. *Pensacola City et al.* (C. C. A., 5th Ct.), 105 Fed., 677, the bill charged that the complainants had been in the possession of certain real estate, but that the defendants illegally wrested possession from them. The prayer was for an injunction to restrain the defendants from disposing of or interfering with the lands or cutting any streets or trees thereon, or committing any trespass; for an account; that the title be quieted; and complainants' interest and title decree. A demurrer was sustained and the bill dismissed. On appeal, the court, in part, said (p. 679):

"The averments of the bill show that the complainant has the legal title to the land claimed, and that defendants have obtained possession by force, and are now in possession. This makes a plain case for an action of ejectment. If these averments are true—and on demurrer they are presumed to be true—the appellant would be entitled to recover the land in ejectment. Under the seventh amendment to the constitution the defendants in possession have the constitutional right to a trial by jury. No statute of the State of Florida is cited as conferring equity jurisdiction on state courts in cases

like this, and such statutes, if enacted, would not control the equity jurisdiction of the federal courts in a case where to enforce the statute would deprive a party of trial by jury. * * * We do not understand the learned counsel for the appellants as disputing these propositions, but their contention is that the bill contains averments that take the case out of the influence of these well settled rules.

First, it is claimed that the court has jurisdiction to prevent a multiplicity of suits. The federal courts, of course, have jurisdiction in equity, in proper cases, to prevent a multiplicity of suits. But there is nothing alleged in the bill to confer jurisdiction on that account. If the defendants are trespassers, having obtained possession by force and violence, as alleged, they may all be joined as defendants in one action of ejectment. * * * But, even if a number of suits were required to settle the controversy as to the lands, each defendant would have the right to submit his claim of title and right to possession to a jury. * * *

The third contention of the appellant is that the court has jurisdiction 'to quiet title from cloud now resting on it by acts of defendants.' It is well settled that a plaintiff not in possession, having the legal title, cannot maintain a bill against defendants who are in possession to remove cloud from title."

In *Smyth* v. *N. O. Canal and Banking Co.*, 141 U. S., 656, the plaintiff in his bill set up a legal title to real estate derived from the State of Louisiana to which it had been listed as swamp or overflowed lands. He averred that the respondents claimed under certain French grants which had been recognized by the Land Office, and prayed that he might be declared to be the owner and put in possession and have an accounting. It was held that he had a plain, adequate and complete remedy at law, and the bill must be dismissed, the court saying (p. 661):

"The demurrer to the bill was, therefore, properly sustained and the suit dismissed on the ground that the complainant had an adequate remedy at law."

Frost v. *Spitley*, 121 U. S., 552, was on a bill alleging complainants were entitled to two lots in Omaha, and

praying for a decree quieting complainants' title. Upon the hearing it was shown that the defendants were in possession. It was said (p. 556):

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. * * * A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment."

In *United States* v. *Bitter Root Development Co.*, 200 U. S., 451, the United States filed its bill to recover from the defendants the value of certain timber alleged to have been wrongfully cut and taken from the public lands. Various grounds for equitable relief were averred, including fraud, conspiracy and violation of trust, and it was urged that a multiplicity of suits would be avoided by the equity jurisdiction. The bill was dismissed, and in affirming the decree, this court, in part, said (p. 471):

"Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy and violation of trust, of which the pleader avers the defendants have been guilty, in various ways, yet upon a careful examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant. * * *

It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has a full and adequate remedy at law for the wrongs complained of."

It was held that no ground for equity jurisdiction was shown, either for fraud, discovery, accounting, or the prevention of a multiplicity of suits. On the latter point it was said (p. 479):

"Nor do we see that there is any jurisdiction on the ground of prevention of a multiplicity of suits. Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives."

The Illinois cases are to like effect. In *Bliss* v. *Kennedy et al.*, 43 Ill., 67, which involved claims to water rights, it was said (p. 75):

"Under the circumstances developed by this record the appellants have no right to resort to a court of equity until they shall have established their right at law. To authorize the interposition of chancery by injunction, a writ which may, in its operation, produce incalculable damage to a manufacturer, against the prosecution of whose legitimate business it is required to issue and does issue—justice requires there should be first established not only a clear and palpable violation of the alleged rights of the party complaining, but the rights themselves should be certain, undoubted, and such as have been ascertained by the verdict of a jury, and can be, thereby, clearly ascertained and measured. When the right is thus established, the aid of a court of chancery to protect appellants in the full enjoyment of it will not be invoked in vain."

In *Livingston County, etc., Association* v. *Keach et al.*, 219 Ill., 9, a bill was brought against two adjoining neighbors of complainant, one or the other of whom was alleged to have encroached upon his land. The bill sought to have the boundary line between the owners of the lots

on each side of complainant's property ascertained. It was said (p. 11):

"It is contended that the court erred in not sustaining the bill as a bill to remove a cloud and quiet title, and also for the reason that a resort to equity was necessary to avoid a multiplicity of suits. If the bill were a bill to remove a cloud and quiet title it could not be maintained, for the reason that the complainant was not in possession of the premises in dispute and they were not vacant or unoccupied. * * *

There is no equitable ground for relief to prevent a multiplicity of suits. According to the bill but one of the defendants is wrongfully in possession of the complainant's property, and, with the facts ascertained, but one action is necessary. The equitable jurisdiction is only exercised when legal remedies are inadequate and there is a necessity for the interposition of equity to prevent unnecessary, annoying and harassing suits."

It will be urged in answer that there is involved the question of the ownership of a vast territory claimed by many persons, and that equity, in order to avoid the bringing of many suits to oust the many separate possessors, should take jurisdiction, because, as against them, all, there is the common question of the Indian ownership. But to this bill there are eight defendants. It is not averred that they represent any larger class, or that there is the common question, so that whatever might be the rule on a properly made case is not material, because this bill makes no such case. And were it otherwise, the objection remains that complainants seek in equity to have confirmed and quieted claims of title for which there is an adequate remedy at law without showing a title so established, or any attempt in that direction. Equity will not take jurisdiction where the title has not been established at law.

The case of *Washburn's Appeal*, 105 Pa. St., 480, is in point. There a bill was filed, praying for an injunction to restrain defendants from entering upon or passing along

a certain lane in possession of the complainants, and for a decree to set apart complainants' alleged title to the premises. It was said (p. 482):

"In actions respecting real property, therefore, if there be no equitable ground of relief involved, the rights of the parties must be determined at law; when thus determined, or when they are admitted in the pleadings, or otherwise clearly appear, an equity based upon that right, superinduced by the acts of the parties, may be asserted, and a decree for equitable relief made; thus equity is made the means, not of establishing the legal right, but of giving adequate protection in the enjoyment of it when thus established. No irreparable injury has been shown, and it does not yet appear that a multiplicity of suits must result under proceedings at law; all parties in interest may be put upon the record in a single suit, and *non constat* that the trial and determination of that suit may not end the controversy; the right to equitable relief may follow, if any equity is superinduced by the acts of the parties, but the interference of equity in such a case rests, as stated by Chan. Kent, in *Gardner* v. *The Village of Newburgh*, 2 Johns., Ch. Rep., 164, 'on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented.'"

Surely, the complainants here have not by their bill shown that they have a clear and certain right to the enjoyment of the property in question, and even though there may be different defendants, equity is without jurisdiction upon the showing here made.

III.

THE COMPLAINANTS' LACHES.

The United States and the states bordering on Lake Michigan have exercised sovereignty and acts of ownership over the waters of Lake Michigan and the submerged lands for more than one hundred years. States

have been created in part out of the territory occupied by the lakes. National and state laws regulating navigation, establishing harbor lines, permitting the reclamation of submerged lands, adjusting and compromising claims for riparian rights, have been from time to time enacted. It is averred in paragraph 16 (Rec., 5) that many persons, including the defendants, have "without the consent of these complainants or of the Pottawatomie Nations from time to time seized tracts of land, both reclaimed, artificially made, and others"; and in paragraph 21 it is charged, in substance (Rec., 7), that the Illinois Central Railroad Company filled in portions of Lake Michigan in 1852, "and has ever since then held and occupied the same without the consent of the complainants, or of the Pottawatomie Nations." It is not pretended in the bill that the complainants are not citizens of the United States, or that they are now, or have been, under any disability to begin actions challenging the invasion of their alleged rights. The bill presents the case of an unexplained delay for more than half a century in the commencement of a suit to question claims of ownership and acts of possession admitted by the bill, and which from their nature were open and notorious. An absolute title is asserted—not one in subserviency to the United States. Equity will not act after such long delay. The rule of laches applies.

In *Schrimpscher* v. *Stockton*, 183 U. S., 290, an action of ejectment was brought by the heirs of a deceased Wyandot Indian. The statute of limitation was pleaded. The court said (p. 296):

"Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians;

* * * * *

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not

chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick,* 145 U. S., 317, 330, S. C., 36 Fed. Rep., 457, 461; *Swartzel* v. *Rogers,* 3 Kansas, 374; *Blue Jacket* v. *Johnson Co.,* 3 Kansas, 299; *Wiley* v. *Keokuk,* 6 Kansas, 94; *Ingraham* v. *Ward,* 56 Kansas, 550, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty."

In *Felix* v. *Patrick,* 145 U. S., 317, the representatives of a deceased Sioux Indian filed a bill averring the issue of a certificate of land scrip, in connection with which the deceased, in her lifetime, executed a power of attorney in blank and a quit claim deed in blank, which came into the possession of Patrick, who caused the blanks to be filled in and the location made under the certificate. Congress, on the procurement of Patrick, confirmed his title to the tract. The Indian was ignorant of these steps until August, 1887, when the Sioux Indians became citizens of the United States. In 1888, the bill was filed. Upon a demurrer the court dismissed the bill on the ground, in part, that complainants and their ancestor were bound to use reasonable diligence in discovering the fraud and seeking redress. It is said (p. 330):

"In reply to this defence of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux Nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. We are by no means insensible to the force of this suggestion. Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts, and as persons 'in a state of pupilage.' * * * But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare

that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this. It is practically admitted in this case that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud."

It was accordingly held that the rule of laches should be applied, but if so in that case, where there was concealment and fraud, how much stronger should the rule apply where the adverse sovereignty and claim of ownership has been open and notorious, and where the bill admits acts of possession by the defendants extending back for more than sixty-five years. No fact in excuse of the delay is averred. The complainants were not mislead or deceived, nor were they under any disability. They are citizens by virtue of the acts of February 8, 1887, and May 8, 1906, as well as of the various treaties and acts by which allotments have been made to the members of the Pottawatomie Nation.

IV.

THE MERITS.

While the foregoing defects in the bill are submitted, the appellees invite the court's consideration of the merits of the claim, confident that it is without foundation. Whether this Indian claim is viewed from the standpoint of the treaty of August 3, 1795, or the Indian rights prior thereto, or from the subsequent treaties and legislation, it will be manifest that since the dominion of Great Britain over the territory, the Indians have had no sovereignty or ownership of Lake Michigan or its submerged lands, and that whatever rights were allotted to

them, by treaties or otherwise, in surrounding lands were subsequently receded; that nearly a century ago, the United States inaugurated the policy of removing the Indians from this territory and terminating all their existing rights; that the policy was thoroughly carried out and so consummated as to leave no shadow of justification for the claim now made. The merits are here reviewed, however, not from apprehension, but because any claim to property of such great value must be taken seriously.

The first claim of the bill is that the Pottawatomie Nation of Indians "were the owners of and in possession and in occupancy as a sovereign and independent nation, from time immemorial" preceding the treaty of August 3, 1795, of large tracts of land around and along the shores of Lake Michigan, "including all of Lake Michigan which is south of" a line running between Milwaukee River, Wisconsin, and the mouth of the Grand River, Michigan (Rec., 2)—an assertion directly denied by the decisions of this court. It has been held repeatedly that the Indian right was that of mere occupancy, which the United States might terminate either by purchase or conquest, and that the Indians had no right in unoccupied parts of the territory, including the Great Lakes.

The case of *Johnson* v. *M'Intosh*, 8 Wheat., 543, is directly in point. It was an action of ejectment brought by grantees under deed made October 18, 1775, by the Piankeshaw Indians, who were afterwards parties to the treaty of August 3, 1795. The land conveyed was in what is now Illinois. The suit was against persons who afterwards, July 20, 1818, acquired title from the United States. Every contention made for the present complainants was there urged in support of the Indian deed, but a judgment for the defendants, who later acquired title from the United States, was affirmed. The great controlling principle was thus stated (p. 584):

"Thus all the nations of Europe who have acquired territory on this continent have asserted in themselves and have recognized in others the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the War of our Revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States' whose boundaries were fixed in the second article. *By this treaty the powers of government and the right to soil which had previously been in Great Britain passed definitively to the United States.* We had before taken possession of them by declaring independence, but neither the Declaration of Independence nor the treaty confirming it could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, *and that the exclusive power* to extinguish that right was vested in that government, which might constitutionally exercise it."

Reference was made to certain acts of Virginia and to the Ordinance of 1787, the court saying (p. 586):

"The lands in controversy lay within the chartered limits of Virginia and were ceded with the whole country northwest of the River Ohio. This grant contained reservations and stipulations which could only be made by the owners of the soil; and concluded with a stipulation that 'all the lands in the ceded territory not reserved should be considered as a common fund for the use and benefit of such of the United States as had become, or shall become, members of the Confederation.' * * * *The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title and to grant the soil has never, we believe, been doubted.*"

The court again referred to the rights which passed from the British Government to the United States, saying (p. 588):

"The British Government, which was then our gov-

ernment, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British Colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."

The principles announced by Chief Justice Marshall, in that opinion, have been adhered to whenever the like question has arisen. The title and right of sovereignty in the lands and waters acquired from Great Britain passed to the United States, and, through it, to the several states since organized.

Another early case, in which the same principle is recognized, is *Mitchel et al.* v. *United States,* 9 Peters, 711, which involved a claim to the lands in East Florida, the title to which was derived from the grant to the Creek and Seminole Indians, ratified by the local authorities of Spain, before the cession of Florida by Spain to the United States. On account of that ratification, the claim was confirmed, but in the course of the opinion it is said (p. 745):

"As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were, as applicable to the British provinces before the acquisition of the Floridas by the treaty of peace, in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied and were considered as owning them, by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was

in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee which passed from the crown, by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, *until they abandoned them. made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians.* * * * Such, too, was the view taken by this court, of Indian rights, in the case of *Johnson* v. *M'Intosh*, 8 Wheat., 571, 604, which has received universal assent."

A later case involving the Indian title to lands in Wisconsin, is *United States* v. *Cook*, 19 Wall., 591. The general rule was thus stated (p. 592):

"The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was decided by this court, as early as 1823, in *Johnson* v. *M'Intosh*. The authority of that case has never been doubted. The right of the Indians to their occupancy is as sacred as that of the United States to the fee. but it is only a right of occupancy. *The possession when abandoned by the Indians attaches itself to the fee without further grant.*"

The foregoing cases are sufficient for the conclusion

that the Indian right was limited to that of occupancy, the ultimate title being in the United States, and that the right of possession when abandoned by the Indians attached to the government's title without further grant. Consistently therewith it is held that where the territory, when discovered, was unoccupied, or the lands subject to tide waters, the complete title and right to possession at once vested in the crown, or later in the United States.

In *Shively* v. *Bowlby*, 152 U. S., 1, the court considered the title to lands below high-water mark in the City of Astoria, Oregon, and in doing so stated the principles of the title to tide-water lands. It was said (p. 14):

"The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the king as the representative of, and in trust for, the nation; *and all vacant lands, and the exclusive power to grant them, were vested in him.* The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And, upon the American Revolution, all the rights of the crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson* v. *M'Intosh*, 8 Wheat., 543, 595; *Martin* v. *Waddell*, 16 Pet., 367, 408-410, 414; * * *"

The court in that case considered the title to submerged lands, both before and after the creation of states out

of the territory, and stated its conclusion as follows (p. 57):

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign, for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the king, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

The new states admitted into the union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters."

In *Martin* v. *Waddell*, 16 Pet., 367, an action of ejectment was brought for one hundred acres of land covered by water in Raritan Bay, in the Township of Perth Amboy, New Jersey. The land claimed was beneath the

navigable waters of the Raritan River and Bay, and the principal right in dispute was the property in the oyster fisheries in the public rivers and bays of East New Jersey. The claim was made under the charters of Charles the Second to his brother the Duke of York, in 1664 and 1674. In reviewing the nature of the interest acquired by the duke, it was said (p. 409):

"The country mentioned in the letters patent, was held by the king in his public and regal character as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the Government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent. The doctrine upon this subject is clearly stated in the case of *Johnson* v. *M'Intosh*, 8 Wheat., 595. In that case the court, after stating it to be a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say that, 'If the discovery be made and possession taken under the authority of an existing government which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national dominions; by that organ, in which all territory is vested by law. According to the theory of the British constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain.'"

The principle of these cases includes the Great Lakes, because, in the very nature of things, there was no occupancy of those great bodies of water by the Indians. Their uses of those waters were limited to the borders

along the lands which they occupied, and as a mere incident thereto. There was no general possession or use of the waters except as so incidental.

In *Illinois Central Railroad Company* v. *Illinois*, 146 U. S., 387, which involved the ownership of certain lands reclaimed by the company from Lake Michigan, the court sustained the company's ownership of the lands which it then had reclaimed and actually possessed. In the opinion, it is said (p. 435):

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee* v. *Hagan*, 3 How., 212; *Weber* v. *Harbor Commissioners*, 18 Wall., 57.

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And not only does it follow from the foregoing decisions that the sovereignty over the waters of Lake Michigan and the title to the lands submerged thereby has been in either the United States or the states along its

borders since the treaty of peace with Great Britain, but the court will know that whatever possession the Indians had of the lakes was incidental to their possession of the shores, and terminated with the abandonment of the shores. It is averred in paragraph 14 of the bill (Rec., 4), as follows:

"That thereafter, at various times, various cessions were made by said Pottawatomie Nation to the United States by treaty between the United States and said Pottawatomie Indians, purporting to be bounded on the east by the then shores of Lake Michigan to and beyond the boundary line between the States of Wisconsin and Illinois on the north, and to and beyond the boundary line between the States of Illinois and Indiana on the south and southeast; but that none of such cessions purported to run further east, northeast or north than the then west, southwest or south shores of Lake Michigan."

It is unnecessary in this connection, therefore, to cite the treaties. The bill admits the recession of the shore lands, so that necessarily there was an abandonment of whatever possession the Indians had of that part of Lake Michigan. The rule is, that upon such abandonment the Indian rights vested in the Government without further grant.

In *United States* v. *Cook*, 19 Wall., 591, it is said (p. 593):

"The possession when abandoned by the Indians, attaches itself to the fee without further grant."

The other source of title averred is the treaty of August 3, 1795 (7 U. S. Stats. at Large, p. 49), made not with the complainants, or the Pokagon Band, but with the Pottawatomie Nation or tribe and other tribes of Indians. The general purpose of that treaty was to accomplish the vacation by the Indians of any lands occupied by them east of the general boundary line described in Article III, which was a north and south line through about the middle of the State of Ohio. By that article

the Indian tribes ceded all their claims to the lands lying eastwardly and southwardly of the general boundary line, and also several specified pieces of land westerly of that line, including the following:

"(14) One piece of land six miles square at the mouth of the Chikago River emptying into the southwest end of Lake Michigan, where a fort formerly stood."

The part of the treaty by which the United States relinquished lands to the Indians is in Article IV, which so far as material to this issue, is as follows:

"In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual, the United States relinquish their claims to all other *Indian lands* northward of the River Ohio, eastward of the Mississippi, *and westward and southward of the Great Lakes* and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783."

(7 U. S. Stats. at Large, p. 51.)

It is upon that relinquishment that the complainants base their claim. But it falls far short of a grant of Lake Michigan. It does not purport to grant the Great Lakes, or the waters uniting them, but the "Indian lands" lying "westward and southward of the Great Lakes and the waters uniting them."

Complainants insist, however, that the lakes were granted, because of the clause in the description reading "according to the boundary line agreed on by the United States and the King of Great Britain"; but the use of that clause of the description is to define the northerly boundary of the "Indian lands" ceded rather than the waters of the Great Lakes. The map and contours of the lands along the national boundary line explain the

purpose of that clause of the description. All the lands were ceded up to the national boundary, even though divided by the waters of the lakes; but it was not intended to relinquish the waters, or otherwise the clause "westward and southward of the Great Lakes and the waters uniting them" would have been omitted as not only unnecessary but directly contrary to such intention. When there is put together the fact that the grant was of "Indian lands" described as lying "westward and southward of the Great Lakes and the waters uniting them," it is not possible to conclude an intention of the Government to convey the sovereignty and title of the lakes themselves.

Moreover, to hold the Great Lakes within the relinquishment by the United States, under the language used in making the cession, will be contrary to the principles by which such grants are construed.

In *Shively* v. *Bowlby,* 152 U. S., 1, it is said (p. 13):

"It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or the long usage under it, clearly indicates that such was the intention."

In *Martin* v. *Waddell,* 16 Pet., 367, the court, referring to grants bordering navigable waters, said (p. 411):

"Grants of that description are therefore construed strictly—and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it."

The intent not to include the Great Lakes in the cession made is further manifest by the description of the safe passages guaranteed by the Indians described in the last paragraph of Article III of the treaty, as follows:

"And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through

their country, along the chain of posts hereinbefore mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store thence along said portage to the St. Mary's, and down the same to Fort Wayne, and then down the Miami *to Lake Erie;* again from the commencement of the portage at or near Loromie's store along the portage from thence to the River Au-Glaize, and down the same to its junction with the Miami at Fort Defiance; again from the commencement of the portage aforesaid, to Sandusky River, and down the same *to Sandusky Bay and Lake Erie,* and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami of the lake; and from thence to Detroit. Again *from the mouth of Chikago,* to the commencement of the portage, between that river and the Illinois, and down the Illinois River to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the *harbors and mouths of rivers* along the lakes *adjoining the Indian lands,* for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

(7 U. S. Stats. at Large, p. 50.)

It will be noted that the different routes described end upon reaching the lakes or start from the lakes; that there is no mention of a safe passage across or upon Lake Michigan, or any other lake, and that the free use allowed is of "the harbors and mouths of rivers along the lakes *adjoining the Indian lands,*" and not of the lakes themselves. In other words, the free passage is through the Indian *lands,* and not over the waters of the lakes—manifestly because the latter is not within the relinquishment.

Moreover against the assertion of absolute title averred in the bill under the treaty of 1795 is Article V thereof, which provides that in order to prevent any misunderstanding about the "Indian lands relinquished"

by the United States, in the fourth article, it is expressly declared that

"The Indian tribes who have a right *to those lands*, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell *their lands, or any part of them*, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment *of their lands* against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

That article accords with the Indian right as explained by the many decisions. It is in harmony with the treaty as a whole which deals with lands as distinct from the Great Lakes, and aids the interpretation which gives force to the words of the relinquishment "and westward and southward of the Great Lakes."

The case of *Beecher* v. *Wetherby*, 95 U. S., 517, was to replevin certain saw logs cut from lands included within an Indian cession in Wisconsin, in 1872. The court, in discussing the treaty, said (p. 525):

"It is true that, for many years before Wisconsin became a state, that tribe" (Menomonee tribe) "occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States,

subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government."

However, the answer to the claim averred in the bill does not rest alone on the general right of the Indians or the treaty of 1795. Many subsequent treaties with the Pottawatomie tribe evidence the care with which the United States obtained the recession of all the "Indian lands" bordering Lake Michigan and the intention to terminate all such rights in this territory.

On August 24, 1816, a treaty was made at St. Louis, between Ninian Edwards, and the "chiefs and warriors of the united tribes of Ottawas, Chipawas, and Pottowotomees, residing on the Illinois and Melwakee Rivers, and their waters, *and on the southwestern parts of Lake Michigan.*" By Article I of that treaty the Indians ceded to the United States

"all the land contained within the following bounds, to wit: beginning on the left bank of the Fox River of Illinois, ten miles above the mouth of said Fox River; thence running so as to cross Sandy Creek, ten miles above its mouth; thence, in a direct line, to a point ten miles north of the west end of the Portage, between Chicago Creek, which empties into Lake Michigan, and the River Depleines, a fork of the Illinois; *thence, in a direct line, to a point on Lake Michigan, ten miles north-*

ward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of the said Chicago Creek; thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois River, to the mouth of Fox River, and thence to the beginning."

(7 U. S. Stats. at Large, p. 147.)

By that treaty the Indians receded to the United States all the lands bordering the part of Lake Michigan now in controversy, and just as the description in the treaty of 1795 is of lands "westward and southward of the Great Lakes," so the eastern boundary in the later treaty is to Lake Michigan, and thence "along the lake."

On July 29, 1829, a treaty was made at Prairie du Chien, between the United States and "the United Nations of Chippewa, Ottawa, and Pottawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers," by Article I of which the Indians ceded with other territory the following:

"And, also, one other tract of land, described as follows, to wit: Beginning on the western shore of Lake Michigan, at the northeast corner of the field of Antoine Ouimette, who lives near Gross Pointe, about twelve miles north of Chicago; thence, running due west, to the Rock River, aforesaid; thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, along the western shore of said lake, to the place of beginning."

(7 U. S. Stats. at Large, p. 320.)

On October 20, 1832, a treaty was made at Camp Tippecanoe, between Commissioners of the United States and "the Chiefs and Headmen of the Pottawatamie Tribe of Indians of the Prairie and Kaukakee, by Article

I of which the Indians ceded to the United States the land described as

"Beginning at a point on Lake Michigan ten miles southward of the mouth of Chicago River; thence, in a direct line, to a point on the Kaukakee River, ten miles above its mouth; thence, with said river and the Illinois River, to the mouth of Fox River, being the boundary of a cession made by them in 1816; thence, with the southern boundary of the Indian Territory, to the state line between Illinois and Indiana; thence, north with said line, to Lake Michigan; thence, with the shore of Lake Michigan, to the place of beginning."

(7 U. S. Stats. at Large, p. 378.)

On October 27, 1832, a treaty was made on the Tippecanoe River, between Commissioners for the United States and "the Chiefs and Warriors of the Potowatomies, of the State of Indiana and Michigan Territory," Article I of which is:

"The Chiefs and Warriors aforesaid cede to the United States, *their title and interest to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River.*"

(7 U. S. Stats. at Large, p. 399.)

Surely, the language of that cession is sufficient answer to every claim made in the bill.

September 26, 1833, a treaty was made at Chicago, between the United States and "the United Nation of Chippewa, Ottawa and Potawatamie Indians, of the other part, being fully represented by the Chiefs and Headmen whose names are hereunto subscribed," by Article I of which the following cession was made:

"The said United Nation of Chippewa, Ottowa, and Potawatamie Indians, cede to the United States *all their land, along the western shore of Lake Michigan,* and between this lake and the land ceded to the United States by the Winnebago Nation, at the treaty of Fort Armstrong made on the 15th September 1832—bounded on the

north by the country lately ceded by the Menominees, and on the south by the country ceded at the treaty of Prairie du Chien made on the 29th July 1829—supposed to contain about five millions of acres."

(7 U. S. Stats. at Large, p. 431.)

In part consideration of the last cession the United States granted to the United Nation of Indians, "to be held as other Indian lands are held," a tract west of the Mississippi River, and by Article II of the treaty it was stipulated:

"That as fast as the said Indians shall be prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes. It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States."

(7 U. S. Stats. at Large, p. 432.)

On September 27, 1833, Articles Supplementary to the last foregoing treaty were made between the said Commissioners and "the Chiefs and Head-men of the said United Nation of Indians, residing upon the reservations of land situated in the Territory of Michigan, south of Grand River," by which the Chiefs and Head-men ceded to the United States all their land in Michigan south of the Grand River to the Indiana line, and agreed that:

"The said chiefs and head-men and their immediate tribes shall be considered as parties to the said treaty to which this is supplementary and be entitled to participate in all the provisions therein contained, as a part of the United Nation; and, further, that there shall be paid by the United States, the sum of one hundred thousand dollars; to be applied as follows: * * *"

(7 U. S. Stats. at Large, p. 442.)

It will be noted that Pokagon is among the beneficiaries described in that schedule as entitled to receive two thousand dollars.

Numerous other treaties with the Chiefs of the Pottawatomie Nation, to whom had been given particular tracts of land, under prior treaties, were made under dates of December 4, 1834, December 10, 1834, December 17, 1834, March 26, 1836, March 29, 1836, April 11, 1836, April 22, 1836, August 5, 1836, September 20, 1836, September 22, 1836, September 23, 1836, whereby the particular Indians relinquished their allotments and agreed to move within a limited time to the territory provided for the Pottawatomie Nation west of the Mississippi River. Practically all these treaties require the payment of large sums of money, not only to bear the expenses of removal, but to purchase particular interests or equities found to exist. They are mentioned as illustrating the detail and care with which the Federal Government secured formal relinquishments of all Indian rights in this territory. An examination of them leaves no room for doubt of the intention of the Government to acquire the recession of all the lands which had previously been ceded to the Indians; to terminate all rights of occupancy, or otherwise, which the Indians had in Illinois, Indiana and the southern part of Michigan. And it is not to be overlooked that in this list of treaties is that of October 27, 1832, with "the Chiefs and Warriors of the Pottawatomies, of the State of Indiana and Michigan Territory," by which they ceded their title and interest "to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River," as above stated.

It is clear that whatever rights were ceded to the Indians by the earlier treaties were recovered by the later treaties, in which broad language to that end is used.

In *Crews* v. *Burcham*, 1 Black, 352, which related to lands in Illinois and considered the treaty of 1832, the statement of the court included the following:

"By the treaty of 1832 the Pottawatomie Indians ceded to the United States all their lands in Illinois, Indiana and Michigan south of the Grand River, and by the same treaty the United States agreed to grant certain quantities of land to certain members of the tribes."

In the opinion the effect of the treaty is repeated in substantially like terms (p. 355):

"By treaty with the Pottawatomie tribe of Indians of October 27, 1832, the Nation ceded to the United States all their lands in Illinois and other States, subject to certain reservations for which patents were to be issued."

In *Doe* v. *Wilson*, 23 How., 457, which was an ejectment to lands in Northern Indiana, and involved the effect of the treaty of 1832, it was said (p. 461):

"By the treaty of October 27, 1832, made by the United States, through Commissioners, with the Pottawatomie tribe of Indians of the State of Indiana and Michigan Territory, said nation ceded to the United States their title and interest in and to their lands in the States of Indiana and Illinois, and the Michigan Territory, South of Grand River."

In that case the court again stated the character of title held by the Indians, as follows (p. 463):

"The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded, but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land to which the United States title was either added, or promised to be added, and it matters not which for the purposes of this controversy for possession."

Throughout that case it is recognized that by the treaty of 1832, all rights of the Pottawatomie Nation in Illinois were ended, except the allotments made to particular Indians, not here in controversy. Moreover, the description in the treaty of 1832 is broad enough to include every character of right, whether to uplands or submerged lands, which the Indians had. They there relinquished all "their title and interest to lands in the States of Indiana and Illinois and in the Territory of Michigan South of Grand River."

On June 5th and 17th, 1846, a further treaty was made between Commissioners and "the various Bands of Pottawatomie, Chippewa and Ottawa Indians," by which they relinquished the lands ceded to them by the treaty of 1833, and removed to the Territory of Kansas, from which such of them as did not accept allotments were subsequently removed to the Indian Territory, under the treaty made February 27, 1867.

The complainants insist, however, that the Indians obtained the title to Lake Michigan and its submerged lands, and did not recede them. There are two sufficient answers. (1) that in the treaties made subsequent to that of August 3, 1795, the recession to the United States is by substantially the same description as was the cession to the Indians by the earlier treaties. In other words, by the treaty of 1795, the territory ceded was located "westward and southward of the Great Lakes and the waters uniting them," while in the treaty of August 24, 1816, the tract then receded was bounded by a line running "thence, in a direct line, to a point on Lake Michigan, ten miles northward of the mouth of Chicago creek; thence, along the lake, to a point ten miles southward of the mouth of said Chicago creek," etc. Moreover the treaty of 1832 was a general relinquishment of *all* the Indian rights to "lands in the

States of Illinois, Indiana, and a part of Michigan"; (2) that under all the authorities, the Indians acquired only the right of occupancy, and there was at no time an occupancy of Lake Michigan, except as an incident to the possession held of the lands bordering upon it. Whenever the right to occupy the lands was reconveyed, the incidental use of the waters of Lake Michigan necessarily followed and was abandoned.

And not only was there a re-cession of all the Indian rights previously granted in the territory, but the United States assumed the ownership, control and sovereignty of the Great Lakes throughout the entire period. They caused the waters along the southwesterly shore of Lake Michigan to be included in the State of Illinois, and that State has repeatedly exercised domain over the waters, as witness the Act of 1869, authorizing the Illinois Central to take possession of a part thereof, and the various acts authorizing the Park Boards to construct parkways upon submerged lands and to settle riparian rights with the shore owners, which are noted in the twenty-first paragraph of the bill. (Rec., 8.)

These various acts of the Government, together with the care displayed in obtaining the recession of all Indian lands, indicate a manifest purpose to terminate whatever rights the Indians had in the territory. The claims made in the bill are utterly inconsistent with the purpose of the subsequent treaties, and, in the face of the clear intention of the Government, it is not now for the court to recognize a condition contrary to that manifest intention.

M. K. & T. Ry. v. *Roberts*, 152 U. S., 114, 116.
Kindred v. *Union Pacific Ry. Co.*, 168 Fed., 648, 652.
Lone Wolf v. *Hitchcock*, 187 U. S., 553, 565.

Stephens v. *Cherokee Nation*, 174 U. S., 445, 483.
Choate v. *Trapp*, 224 U. S., 665, 671.

The doctrine of the cited cases is that so manifest an intention of the Government will not be disturbed by the courts.

The near approach of the hearing on this appeal has made necessary the preparation of this brief and argument without having copy of appellants' brief, but in the court below they quoted extensively from *Worcester* v. *Georgia*, 6 Pet., 536, to sustain their claim of an absolute ownership by the Indians of the territory in dispute. It will suffice to say in answer that, as pointed out by the court, the conditions of that case depended largely upon grants and cessions made or approved by the foreign governments owning the territory before the cession to the United States, and the issue was of the validity of certain statutes of Georgia, as against the treaties and jurisdiction of the United States over the Indian tribes. There is nothing in the case, when the facts are considered, in any way out of line with *Johnson* v. *M'Intosh*, 8 Wheat., 543, and other cases above cited.

Another contention was that the Government has repeatedly recognized the title of the Great Lakes in the Indians, by treaties made, and, among others, was cited the treaty of Detroit, of November 17, 1807 (7 U. S. Stats. at Large, p. 105), but if Article I of that treaty, in which the cession was made, is read, it will be seen that the cession there, as in other treaties, was of "all right, title and interest which the said nations now have or claim, or ever had or claimed, in or unto *the lands* comprehended within the following described lines and boundaries," and then follows a description of an exten-

sive territory, the easterly boundary of which followed the boundary line between the United States and Upper Canada, down through the River St. Clair, Lake St. Clair, and River Detroit, into Lake Erie, to a point due east of the Miami River. The conveyance was of the *lands*, and though the boundaries included part of the waters of the lakes, it was a part in which there were numerous islands, and the cession was only of "the lands comprehended" therein.

Another like reference was to the treaty of March 28, 1836, with the Ottawa and Chippewa Nations of Indians, which, it is claimed, ceded to the Government parts of Lakes Michigan and Superior, but the description in the first article of that treaty covered an extensive part of Northern Michigan, in which were many islands and irregular land boundaries. The grant was of "the tract of country" within the described boundaries, and following the description is the clause "comprehending all the lands and islands within these limits not hereinafter reserved." There is surely nothing in that treaty to justify the claim that the United States recognized the Indians as the owners and sovereigns of Lake Michigan.

A further contention then made was that in the treaty of August 3, 1795, the Government recognized the Indian title to the Lakes, by the description of the thirteenth special tract ceded by the Indians, under Article III. That description is:

"(13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on lake Huron, or the streight between lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island De Bois Blanc, being an extra and voluntary gift of the Chipewa nation."

But that again was a grant of lands, part of which was the large Island of De Bois Blanc, located in the straits between Lakes Huron and Michigan.

Cases were then cited, such as *United States* v. *Winans,* 198 U. S., 378, 380, *Northern Pacific Ry. Co.* v. *United States,* 227 U. S., 355, 366, to show that the Indians should be favored in the interpretation of treaties, but in none of the cases is there a suggestion that will justify the court at this late day in overturning the settled principles which have governed the Indian titles or the century old policy of the Government to extinguish all rights of the Indians in the territory in dispute.

Again, they cited *United States* v. *Allen,* 171 Fed., 907, 925, *Gibbons* v. *Chouteau,* 13 Wall., 92, *Sheldon* v. *Donahue,* 40 Kas., 346, 348, in support of claim that laches should not be urged against the complainant, but the cases have little bearing. The claimants in the present bill are citizens of the United States, and they are asserting a title in themselves in fee. They show no disability or circumstance to explain the long delay in the assertion of their claim.

While the appellees have not received appellants' brief, it is believed that if filed nothing will be found therein in conflict with the cases cited in this brief.

The appellees, therefore, submit that the claim averred in the bill is contrary to the Indian title as recognized by this court; to the very terms of the treaty of August 3, 1795; to the subsequent treaties by which the Pottawatomie Nation relinquished to the United States all title and interest to lands in Illinois; to the sovereignty over and ownership of Lake Michigan and its submerged lands, evidenced by the settled policy of the Government since its existence; that the many treaties of

which this court will take notice, together with the authority and acts of ownership of the United States, and, through it, the State of Illinois, for the last seventy-five years, conclusively show an intention of the Government to end all rights of whatsoever character of the Indians in this territory, and under the decisions cited will not permit the recognition of an Indian title by this court.

Respectfully,

W. S. HORTON,
ROBERT REDFIELD,
W. D. McKENZIE,
FRANCIS O'SHAUGHNESSY,

Solicitors for Illinois Central R. R. Co., South Park Commissioners, Commissioners of Lincoln Park, Illinois Steel Company, C. C. C. & St. L. Ry. Co., Michigan Central R. R. Co., M. St. P. & S. Ste. M. Ry. Co.

WILLIAMS, CHIEF, ET AL. *v.* CITY OF CHICAGO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 128. Argued December 22, 1916.—Decided January 8, 1917.

At the date of the Treaty of Greenville, August 3, 1795, 7 Stat. 49, the right of the Pottawatomie Nation in lands on and near the shore of Lake Michigan now in Illinois was no more than a right of occupation.

If the occupancy ever extended to lands formerly submerged in the lake such as are the subject of this litigation, the court notices his-

torically that it was long ago abandoned and that for more than half a century no pretense of such occupancy has been made by the tribe. The treaty did no more than confirm the tribal right of occupancy, and when that was abandoned all interest of the tribe and its members was terminated.

THE case is stated in the opinion.

Mr. J. G. Grossberg, with whom *Mr. W. W. DeArmond* was on the briefs, for appellants.

Mr. Chester E. Cleveland, with whom *Mr. Samuel A. Ettelson* was on the brief, for the City of Chicago.

Mr. W. S. Horton, with whom *Mr. Robert Redfield*, *Mr. W. D. McKenzie* and *Mr. Francis O'Shaughnessy* were on the brief, for the Illinois Central Railroad Co. *et al.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The claim set up in this cause is without merit and the amended bill was properly dismissed, upon motion, for want of equity.

Complainants are eight Pottawatomie Indians, members of the Pokagon Band and residents of Michigan. They undertake to sue "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them."

Defendants are the City of Chicago and certain corporations now occupying valuable lands within the geographical limits of Illinois, which have been reclaimed from Lake Michigan.

The bill proceeds upon this theory—

That from time immemorial, on August 3, 1795 and

thereafter, the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of land around and along the shores of Lake Michigan, south of a line running from Milwaukee River, Wisconsin, to Grand River, Michigan, and extending, "east and west of said two points and including all of Lake Michigan which is south of said line"—a stretch of a hundred miles.

That by the Treaty of Peace entered into at Greenville, Ohio, August 3, 1795, the United States relinquished to the Pottawatomie and other tribes their claims to Indian lands westward of a designated line passing through the State of Ohio and lying, "northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year of 1783."

That by later treaties the Pottawatomie Nation receded to the United States all such lands up to the shores of Lake Michigan, but those within the geographical limits of Illinois which were formerly beneath the waters of Lake Michigan, "whether reclaimed, artificially made, or now or formerly submerged . . . have remained and still are the property of these complainants, . . . and any attempts on the part of any persons, firms, and corporations to appropriate the same, or any part thereof were and are in violation of said treaties and of the rights of these complainants."

That in 1833, with the exception of the Pokagon Band, in pursuance of a treaty with the United States, the Pottawatomie Nation migrated west of the Mississippi River leaving that band in possession, occupation, control and sovereignty of so much of the nation's original country as remained unceded.

That the United States has refused to purchase the re-

claimed lands and consequently complainants are at liberty to occupy, sell, lease, or dispose of the same as their own in fee simple.

The bill prays that defendants be enjoined from occupying or building upon the specified land or from asserting any claim, title, or interest therein; that they be required to pay a reasonable compensation for its use; and that the complainants' title thereto be quieted, established and confirmed.

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson* v. *McIntosh*, 8 Wheat. 543. If in any view it ever held possession of the property here in question we know historically that this was abandoned long ago and that for more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

By the Treaty of Greenville the United States stipulated with the Pottawatomies and other Indians that generally in respect of a large territory westward of a line passing through Ohio, "The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and untill such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the

territory came to an end. *Johnson* v. *McIntosh*, 8 Wheat. 543, 584, 586, 588; *Mitchel* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591, 592; *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

It is unnecessary to consider other reasons suggested by counsel in support of the decree below.

Affirmed.